81-1805

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee Of The Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, As Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, As Indenture Trustee; HENRY CROWN, *et al.*; UNITED STATES OF AMERICA, and The INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

In the opinion of petitioner Railway Labor Executives' Association (RLEA),* the following questions are presented by this petition:

1. Does a railroad reorganization court have the discretion to refuse to comply with the clear and unambiguous mandate of Section 17(a) of the Milwaukee Railroad Restructuring Act that a fair arrangement be imposed whenever that court authorizes any abandonment of the rail lines of a railroad in reorganization?

2. Do either the Due Process or Just Compensation Clauses of the Fifth Amendment prohibit Congress from requiring an unreorganizable railroad to aid its employees bear the economic hardships caused by the withdrawal of that debtor's assets from railroad operations?

3. Does the fact that a reorganization court both has presided over the unsuccessful efforts to reorganize a railroad debtor and has ordered that debtor to be liquidated justify that court's refusal to conduct an evidentiary hearing under 11 U.S.C. § 1170 when a party challenges the Trustee's request to abandon the entire railroad system?

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* Petitioner Railway Labor Executives' Association (RLEA) is a voluntary, unincorporated association of the Chief Executive Officers of virtually all of the standard labor organizations which represent railroad employees. RLEA's member organizations are listed in Appendix F to this petition at 61a. While many parties have appeared before the reorganization court during the reorganization proceeding, not all have expressed an interest in the issues raised by this petition. RLEA has listed as respondents herein only those parties who have participated in the appeal from which this Writ of Certiorari is being sought.

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RAILWAY LABOR EXECUTIVES' ASSOCIATION,
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WILLIAM M. GIBBONS, Trustee Of The Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, As Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, As Indenture Trustee; HENRY CROWN, *et al.*; UNITED STATES OF AMERICA, and The INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] respectfully requests pursuant to 28 U.S.C. § 1254(1) that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and to reverse the Judgment of that court which was entered on October 13, 1981, affirming an order of the United States District Court for the Northern District of Illinois authorizing

the abandonment of the Chicago, Rock Island and Pacific Railroad Company [hereinafter, "CRI" or "Rock Island"] without conducting an evidentiary hearing and without imposing an arrangement to protect employees as required by Section 17(a) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. §915(a).

OPINIONS BELOW

Except for the report by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] recommending the abandonment at issue, all of the decisions in this case are not officially reported. The unpublished order of the court of appeals [1] which was entered on October 13, 1981, is reproduced herein as Appendix A. Minor technical corrections were made to that order by a subsequent per curiam order which was issued *sua sponte* on October 22, 1981, and which is reproduced herein as Appendix A-1 at 17a. On December 10, 1981, the court of appeals denied RLEA's petition for rehearing; that order is reproduced as Appendix D at 55a.

The unpublished order of the District Court which was affirmed by the appellate court was dated June 2, 1980, and is reproduced herein as Appendix B-1 at 19a. The District Court orally stated its reasons for that order, and the transcript of its oral comments is

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[1] Rule 35(b)(2)(iv) of the Circuit Rules of the Seventh Circuit provides that an unpublished order:

> Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) by such court for any purpose.

reproduced as Appendix B-2 at 23a. That decision was made after the ICC had submitted a report under Section 17(a) of the MRRA, served May 27, 1980, which is reported at 363 I.C.C. 150 (1980); relevant portions of that report are reproduced herein as Appendix B-3 at 33a. Appendix B-4 at 51a is a reproduction of an unreported ICC decision denying as moot RLEA's request for the ICC to reconsider its remarks on employee protection in Appendix B-3.

JURISDICTION

The unpublished order (Appendix A) and its accompanying judgment (Appendix C at 53a) by the court of appeals, which RLEA is asking this Court to review, were entered on October 13, 1981. RLEA filed a timely petition for rehearing and a suggestion for rehearing *en banc* on November 10, 1981; the petition for rehearing was denied on December 10, 1981. Appendix D at 55a. On March 4, 1982, and then on March 17, 1982, petitioner was granted extensions to and including March 30, 1982, in which to file this petition. *RLEA* v. *Gibbons,* Sup. Ct. No. A-761. This petition has been filed within that extended time and within one hundred and fifty (150) days of the date of the court of appeals' denial of the petition for rehearing. 28 U.S.C. § 2101 (c). Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction of the employee protective provision of Section 17(a) of the MRRA, 45 U.S.C. § 915(a), as well as the proper interpretation to be given to the hearing requirements in Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170. Both

Section 17 of the MRRA and 11 U.S.C. § 1170 are reproduced in Appendix E at 57a. The Due Process and Just Compensation Clauses of the Fifth Amendment of the Constitution of the United States [2] will be involved in this case if this Court concludes that Section 17(a) of the MRRA makes the imposition of employee protection mandatory in *any* abandonment proceeding.

STATEMENT OF THE CASE

After operating at a loss for at least eight (8) years, the Rock Island on March 17, 1975, sought the aid of Section 77 of the Bankruptcy Act, 11 U.S.C. § 205,[3] and filed a petition with the United States District Court for the Northern District of Illinois to reorganize under the provisions of that statute. At the time it filed that petition, the Rock Island was one of the largest railroads in this country, operating in thirteen (13) states over more than 10,000 miles of track and employing approximately 10,000 employees. *See,* Appendix B-3 at 37a-38a. It was, as the ICC recognized in 1974, an important segment of this nation's continental transportation system. ***E.g., Chicago & North Western Ry.—Control—Chicago, Rock Island & Pac. R.,*** 347 I.C.C. 556, 595 (1974).

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[2] Relevant portions of the Fifth Amendment provide as follows: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

[3] The Bankruptcy Act, including Section 77, 11 U.S.C. § 205, has been repealed by the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549. That appeal, however, is not effective for cases, such as the proceeding at bar, which were pending under the Bankruptcy Act when the Reform Act was enacted. Section 403(a), 92 Stat. 2683.

Shortly after the petition to reorganize was filed, respondent William M. Gibbons was appointed as Trustee of the Rock Island's properties, and he continued to operate that railroad. Although the carrier's cash position was temporarily improved by the Trustee's ability under Section 77 to defer interest and principal payments, the Rock Island continued to experience operating losses (*e.g.*, $38.5 million in 1977) as well as a steady erosion of its traffic base. *See, Chicago, Rock Island & Pac. R. (William M. Gibbons, Trustee)--Abandonment*, 363 I.C.C. 150, 175-77 (1980). This rapidly deteriorating financial position was exacerbated by the severe winter of 1978-79 which sharply increased the Rock Island's operating losses and substantially damaged its physical plant (*Id.* at 177-81), and thus, by the summer of 1979, both the creditors and the shareholders of the debtor were demanding its liquidation.

As August 1979 came to a close, first one and then another of Rock Island's labor organizations struck that railroad after those unions had exhausted the procedures of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, in unsuccessful attempts to resolve major disputes with the Trustee. Once the labor organizations went on strike, the Trustee "locked-out" his contract employees and attempted to operate a truncated system using non-union personnel. Because of the impact which the Rock Island's curtailed operations had on the rail transportation system, the President, on September 20, 1979, invoked the status quo provisions of Section 10 of the Railway Labor Act, 45 U.S.C. § 160, by creating an Emergency Board under that Section. *Executive Order No. 12,159*, 44 Fed. Reg. 54687 (September 21, 1979).

When it became apparent that the Trustee lacked the cash to resume operations, the ICC exercised its powers under 49 U.S.C. § 11125 on September 26, 1979, and directed the Kansas City Terminal Railway Company [hereinafter, "KCT"] to operate "virtually all" of the Rock Island's rail lines. *Directed Service Order No. 1398,* 360 I.C.C. 289, 290-92 (1979). On that same day, the reorganization court denied the oral application of the Trustee to continue operating the Rock Island system. Directed Service operations by the KCT began October 5, 1979, and continued until March 1980. In March, other rail carriers assumed the obligation to operate portions of the Rock Island, first under uncompensated directed service orders pursuant to 49 U.S.C. § 11125, and then under interim authorities granted pursuant to Section 122 of the Rock Island Transition and Employee Assistance Act [hereinafter, "RITA"], 45 U.S.C. § 1017, after the enactment of that Act on May 30, 1980. While a substantial portion of the Rock Island is not operated today, portions have been sold for continued rail usage,[4] and other portions are being operated under temporary authorities issued pursuant to Section 122 of RITA. *See, Service Order No. 1473,* 33rd Revision, served February 18, 1982.

Several months after the KCT began its directed service operations over the Rock Island, the Trustee

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[4] In his status report on the liquidation process for the period ending December 31, 1981, the Trustee reported that only 133 miles of track (excluding the 1,027.3 miles involved in appeals Nos. 80-2199 and 80-2286) had been sold as of December 31, 1981. An additional 403 miles were the subjects of signed but unconsummated sale agreements.

filed a plan of reorganization on December 28, 1979.[5] By Order No. 221, issued January 9, 1980, the reorganization court gave all interested parties until January 28, 1980, in which to file comments which the court would then transmit together with the Trustee's plan to the ICC for consideration under Section 77(d) of the Bankruptcy Act, 11 U.S.C. § 205(d). However, before the comment date had passed, the court received a report on January 21, 1980, from an independent consultant firm which concluded that the Trustee's proposed reorganization was not viable. On January 25, 1980, the court found that the consultant's study was "a good study" and that the court was "compelled . . . if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success." *RLEA* v. *Gibbons* [hereinafter, *"Liquidation Petition"*], Sup. Ct. No. 80-1899, Appendix C at 21a, *cert. denied*, October 5, 1981. The court then refused to transmit the plan to the ICC as Bankruptcy Rule 8-303 required, and instead instructed the Trustee "to commence preparation of [a] preliminary plan for liquidation" of the debtor. *Liquidation Petition,* Appendix B at 18a. RLEA noted an appeal from that order, but on February 11, 1981, the Seventh Circuit affirmed in an unpublished per curiam opinion. *Liquidation Petition,* Appendix A. This Court subsequently denied RLEA's petition for a writ of certiorari. *RLEA* v. *Gibbons,* Sup. Ct. No. 80-1899, *cert. denied,* October 5, 1981.

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[5] The Trustee's plan called for a "core" type of operation by which the reorganized system would operate much less than one-half of the CRI system, basically in the northeastern portion of its system.

A. The Abandonment Order

On April 14, 1980, the reorganization court directed the Trustee to file an application with the ICC under Section 17 of the MRRA "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other entities for their operation thereof . . . ." Order No. 232, dated April 14, 1980, at 1-2. That order also instructed the ICC to file its report with the court thirty (30) days after the Trustee filed his application, and set comment and hearing dates for further action on the Trustee's abandonment motion. The Trustee filed his application with the ICC on April 24, 1980, and the ICC accepted that application over RLEA's objections that the application lacked necessary financial information. Appendix B-3 at 36a. On May 27, 1980, the ICC served its report and stated:

> We conclude that abandonment of the Rock Island and its dissolution as an operating railroad is [*sic*] required by the public convenience and necessity. We have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued public service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated. Nevertheless, the communities and shippers served by the Rock Island have also shown that many of its services are essential and can be profitable. We recommend to the court that, in permitting abandonment, it take steps to insure that the service over the viable portions of the Rock Island

> is not interrupted and that these portions are sold as operating lines. . . .

Appendix B-3 at 34a-35a. The Commission also commented upon the Court's obligation under Section 17(a) of the MRRA to provide a fair arrangement to protect employees. After observing that the *New York Dock* conditions[6] are "apparently mandated by Section 17(a) of the MRRA" (Appendix B-3 at 45a), the ICC went on to note the "options" which it believed the court had in this area. According to the ICC: "The *New York Dock* conditions can be imposed on the Rock Island. However, another viable option is not to impose any form of labor protection."[7]

RLEA filed its comments on May 30, 1982, and asserted that *inter alia* Section 17(a) of the MRRA and 11 U.S.C. § 1170(c) required the reorganization court to conduct an evidentiary hearing at which the trustee would have the burden of establishing that the abandonment of the entire Rock Island system satisfied the test established by 11 U.S.C. § 1170(a).[8] RLEA

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[6] Those employee protective provisions promulgated in *New York Dock Ry.—Control*, 360 I.C.C. 60 (1979), *aff'd sub nom., New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[7] RLEA asked the ICC to reconsider that advice, but on December 15, 1980, the ICC served a decision which dismissed that request as moot because the ICC viewed Section 106 of RITA, as amended, as "effectively pre-empt[ing] labor protection to Rock Island employees resulting from the abandonment . . . ." Appendix B-4 at 52a.

[8] RLEA asserted that an evidentiary hearing was necessary: (1) to examine whether the Rock Island was "ll "cashless" and would continue to remain so even after selling assets; (2) to determine whether the carrier could operate essential rail services in a reduced system; and (3) to determine the impact of the proposed abandonment on employees.

also asserted that if the court approved the abandonment application in whole or in part, it was required by Section 17(a) of the MRRA "to provide a fair arrangement at least as protective of the interests of employees as that required under . . . [49 U.S.C. § 11347]." 45 U.S.C. § 915(a). At the hearing on June 2, 1980, the reorganization court rejected both arguments and issued Order No. 248 which "confirmed and decree the "total systems abandonment of Rock Island's lines and the discontinuance of all of its rail services and obligations as a common carrier . . . ."[9] Appendix B-1 at 21a. Order No. 248 further provided that "no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court pursuant to Section 17" of the MRRA. *Id.*

RLEA's assertion that Section 17(a) of the MRRA and Section 1170(c) of the Bankruptcy Code required an evidentiary hearing was rejected by the reorganization court because it concluded that in the course of presiding over the Rock Island's reorganization it had been "holding hearings on the subject of abandonment of the Rock Island for five years." Appendix B-2 at 27a. Because of its extensive participation in the Rock Island's attempts to survive, the court concluded that the prior court proceedings were "all the hearings I have to have or need to have on the subject of the need and desirability of an order to discontinue operations." *Id.*

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[9] Those CRI rail lines listed in Appendix D to the ICC report were exempted from that abandonment authority for a period which was extended once, but which expired on March 31, 1981. *See*, Appendix A at 9a n.4.

When it addressed the merits of the Trustee's and the creditors' joint request for an abandonment order, the court noted that: "Abandonment is really only a technical recognition in this case of what I might have previously ordered and what has actually happened." Appendix B-2 at 27a. According to the reorganization court, the debtor was a "bankrupt business" whose private creditors could no longer be required to support forever its operations at a loss. *Id.* at 24a. It was that finding which had led the court to conclude that "continued operation of the Rock Island has passed that point where it is mandated by the public interest and is such a serious financial disservice to the creditors that it was terminated and had to be terminated." *Id.* at 25a. And it was that conclusion which led the court to find in its order at bar that the "Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated . . . ." Appendix B-1 at 20a. This Court's decision in *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U.S. 396 (1920), was cited as support. *Id.*

Even though Section 17(a) of the MRRA provided that in "authorizing *any* abandonment pursuant to this section, the court *shall require* the carrier to provide a fair arrangement [to protect employees]" (45 U.S.C. § 915(a) (emphasis added)), the reorganization court concluded that Section 17(a) did not "control the situation" it faced. Appendix B-2 at 27a. The court reached that conclusion because it believed that: "Section 17 . . . and its labor protection provisions contemplate less than entire system abandonment in imposing labor protection obligations . . . ." *Id.* In its order authorizing the abandonment, the court stated as follows in further explaining its decision to dis-

regard the congressional mandate in Section 17(a) that employee protection be provided:

> . . . Rock Island's systemwide termination of operations and total line abandonment . . . do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. . . . and, that consistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate . . . .

Appendix B-1 at 20a-21a. RLEA noted an appeal from that order on June 9, 1980.[10]

B. The Court of Appeals' Decision

Although the reorganization court had relied upon constitutional principles in concluding both that the estate had an immediate and unconditional right to abandon and that the assets of the debtor could not be used to aid Rock Island employees, the Seventh Circuit did not address those constitutional issues in affirming the abandonment order. Rather, the court of appeals relied upon its construction of Section 1170

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[10] After the reorganization court refused on June 2, 1980, to stay the abandonment as required by 11 U.S.C. § 1170(d)(1), RLEA asked the Seventh Circuit on June 9, 1980, to enforce 11 U.S.C. § 1170(d)(1). That request was denied. On July 7, 1980, appellant asked the court to reconsider its ruling, but on September 18, 1980, that request also was denied.

of the Bankruptcy Code and of Section 17(a) of the MRRA to affirm.[11]

RLEA had argued to the appellate court that Section 1170 of the Bankruptcy Code, which was made applicable to this case by Section 17(a) of the MRRA, required the reorganization court to conduct an evidentiary hearing before it authorized any abandonment. Indeed, the requirement for a pre-abandonment hearing appears in both subsections (a) and (c) of Section 1170. Nevertheless, relying upon Section 102 (1)(A) of the Bankruptcy Code, 11 U.S.C. § 102(1)(A), the court of appeals concluded that the "particular circumstances" of each case must be considered in determining whether an "adequate evidentiary hearing" was provided. Appendix A at 4a. Observing that the CRI reorganization court "had been totally im-

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[11] The court of appeals also dismissed as moot two (2) appeals which RLEA had taken from orders of the reorganization court authorizing the sale of Rock Island lines to two (2) existing carriers, but refusing to impose arrangements to protect Rock Island employees. RLEA argued in one of those appeals (*i.e.*, No. 80-2286) that the court did not have the right to disregard the ICC's order authorizing that sale under 49 U.S.C. § 11343, which approved the sale on the condition that the estate provide a fair arrangement to protect CRI employees. In the other appeal (*i.e.*, No. 80-2199), RLEA asserted that Section 17(b)(1) of the MRRA, 45 U.S.C. § 915(b)(1), required the protection of both CRI employees and the purchasing carrier's employees who were not covered by what is known as the March 4 Hiring Agreement. The court of appeals dismissed those appeals as being moot because, relying upon Bankruptcy Rule 8-703(a)(6), it concluded that since the sale orders were not stayed, an appeal could not change the terms of the completed sales. While RLEA submits that its appeals were not moot (*see, County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979)), it is not presenting that issue with this petition.

mersed in the Rock Island's affairs since March 17, 1975" (*Id.*), the appellate court found that the reorganization court did not abuse its discretion "in concluding that, under the particular circumstances before it, an additional evidentiary hearing was not required." *Id.* at 5a.

The reorganization court's refusal to hold a hearing was also justified, the court of appeals opined, because RLEA "was seeking an evidentiary hearing to determine essentially whether the Rock Island was reorganizable—a question that had been previously decided in the negative by the reorganization court in its January 25, 1980, liquidation order." Appendix A at 5a. Since liquidation could not proceed without abandonment authority, the abandonment order simply "fulfilled an important procedural requirement" to effectuate "substantive decisions that had already been made." *Id.* Thus, "a further evidentiary hearing would . . . have served no useful purpose." *Id.*

When it addressed RLEA's assertion that Section 17(a) of the MRRA required the reorganization court to provide a fair arrangement to protect Rock Island employees, the court of appeals noted that "RLEA's position is certainly reflected in the language of the statute." Appendix A at 10a. "But," the court continued, "it is contrary to what seems so clearly to be the intent of Congress in enacting § 17a [sic]." *Id.* Relying upon a statement in the Conference Report to the MRRA, the court concluded that the language used by Congress in Section 17(a) of the MRRA must be interpreted in light of Congress' intent "to make no change in existing law as it affects employee protection." H. Rpt. No. 96-583, 96th Cong., 1st Sess. at

27 (1979). To determine what that "existing law" was, the court reviewed ICC practice, primarily as it existed prior to 1976 when Congress made employee protection mandatory in abandonment cases (*see,* Section 802, Pub. L. No. 94-210, 90 Stat. 31, 127),[12] and it found that "existing law regarding labor protection includes the long established I.C.C. practice of denying labor protection in total abandonments." Appendix A at 10a. Thus, the appellate court concluded, the reorganization court "properly declined to provide labor protection in connection with the total abandonment of the Rock Island." *Id.* at 13a.

RLEA was granted to November 10, 1981, in which to petition for rehearing, and on that day it filed a suggestion that the Seventh Circuit rehear the appeals *en banc* and a request that the panel reconsider the employee protection and mootness issues. On December 10, 1981, the court issued an order denying RLEA's petition for rehearing. Appendix D at 55a.[13]

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[12] In its review of prior ICC practice, the court of appeals incorrectly assumed that the pre-1976 ICC practice was developed under a statute which made employee protection mandatory in abandonment cases. *See,* Appendix A at 10a-11a. This misconception is evident from the court's citation (*Id.* at 11a) of the 1976 Conference Report as being the conference report to the 1978 recodification statute—Pub. L. No. 95-473, 92 Stat. 1337 (1978).

[13] On August 4, 1980, the United States noted an appeal from Order No. 248 of the reorganization court; that appeal was docketed as 7th Cir. No. 80-2075, and has been held in abeyance pending the outcome of this Court's consideration of *Railway Labor Executives' Assoc.* v. *Gibbons,* Sup. Ct. Nos. 80-415 and 80-1239, decided March 2, 1982. On March 19, 1982, the government moved to dismiss its appeal.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Of Federal Law, Including Recurring Constitutional Issues, Which Must Be Addressed By This Court To Remove Unwarranted Obstacles Which The Lower Courts Have Placed Upon Congress' Regulation Of Railroad Reorganizations

It is axiomatic that the Constitution of the United States gives Congress and not the federal courts the power to regulate interstate and foreign commerce and to establish uniform laws on the subject of bankruptcies. U.S. Const. art. 1, § 8, cls. 3, 4. If that separation of powers is to retain its validity, federal courts must not hinder the legitimate regulation of commerce or expand the scope of bankruptcy laws under the guise of either statutory construction or the protection of general, undefined constitutional rights. Moreover, it is but a corollary of the separation of powers doctrine that this Court has an obligation to review actions of the federal judiciary which, as in the case at bar, place unwarranted obstacles upon Congress' efforts to exercise its constitutional powers under the Commerce and Bankruptcy Clauses. Petitioner RLEA respectfully submits that this case, as well as that presented in *Railway Labor Executives' Assoc.* v. *Scott* [hereinafter, "*Susquehanna*"], Sup. Ct. No. 81-1715, present situations in which review by this Court is necessary to enable Congress to exercise effectively its powers under both the Commerce and Bankruptcy Clauses.

When it passed Sections 5(a) and 17(a) of the MRRA in November 1979, Congress transferred to Section 77 railroad reorganizaton courts the powers to regulate the abandonment of bankrupt railroad lines which had been delegated previously to the Interstate

Commerce Commission. But, consistent with its long-standing policy of requiring railroads to protect the interests of employees,[14] Congress qualified the abandonment authority it was delegating to the Section 77 courts by providing that: "In authorizing *any abandonment pursuant to this section, the court shall require* the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under . . . [49 U.S.C. § 11347]." 45 U.S.C. § 915 (a) (emphasis added). As this Court has long recognized, such employee protections serve a strong public interest in guaranteeing the "stability of the labor supply available to the railroads . . . ." *ICC* v. *Railway Labor Executives' Assoc.*, 315 U.S. 373, 377 (1942). Moreover, such protection obligations may be imposed upon even a railroad in reorganization without affronting the Due Process guarantees of creditors and investors. *United States* v. *Lowden, supra* note 14, 308 U.S. at 240.

Congress obviously relied upon those past decisions of this Court in devising the means it would use in the MRRA to protect both the public and debtor-creditor interests in railroad reorganizations. And as shown by its actions in authorizing the Milwaukee Railroad Trustee to enter into an alternative employee protection program (*i.e.*, Sections 9 and 15, MRRA, 45 U.S.C. §§ 908, 914), Congress considered adequate employee protection to be important to the preservation of essential rail services. Moreover, as Congress' actions in twice enacting the employee protective programs of RITA show (*i.e.*, Section 106, 45 U.S.C.

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[14] *E.g., United States* v. *Lowden*, 308 U.S. 225 (1939); Section 7, Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 213-14; 49 U.S.C. §§ 10903(b)(2), 11347.

§ 1005), Congress has concluded that the protection of employees affected by the demise of the Rock Island is essential to the preservation of rail service in the CRI service area. Sections 102(1) and (2) of RITA, 45 U.S.C. §§ 1001(1), (2); H.Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26 (1980).

Besides intending to assure an adequate supply of railroad employees, Congress has required the imposition of employee protective provisions in railroad reorganizations to serve another purpose as well—*i.e.*, to discourage railroad liquidations. As Congress explained in its Conference Report to the Staggers Rail Act of 1980 [hereinafter, "SRA"], Pub.L. No. 96-448, 94 Stat. 1895:

> The conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest.

H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138-39 (1980).

Congress, petitioner RLEA submits, clearly has the right under its Bankruptcy Clause powers to limit the ability of railroads to liquidate under the Bankruptcy laws it enacts. Indeed, prior to 1933, railroads were "excluded from the operation of the bankruptcy law." H.Rpt. No. 1897, 72nd Cong., 2d Sess. at 5 (1933). And when Congress passed Section 77 of the Bankruptcy Act of 1933, 47 Stat. 1467, 1474 (1933), it did not give the full benefit of those laws to railroads. *See,* Section 4 of the Bankruptcy Act, 11 U.S.C. § 22. As this Court explained in *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pac. Ry.*, 294 U.S.

648, 676 (1935) (emphasis added): "[A] proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding *which seeks only to bring about a reorganization,* if a satisfactory plan to that end can be devised." Thus, Congress' approach to the financial plight of railroads has been to encourage "continued rail service through railroad reorganizations rather than liquidations . . . ." 126 Cong. Rec. H8619, col. 2 (September 9, 1980). Its use of employee protection requirements to aid in fostering that goal is clearly consistent with that purpose, and is an integral part of both the MRRA modifications to Section 77's and the Bankruptcy Code's railroad reorganization provisions,[15] as modified by Section 227 of the SRA, 94 Stat. 1931.

Unfortunately, the decisions below, by themselves and especially when taken together with those in the *Susquehanna* case, have effectively undermined the statutory scheme which Congress has so carefully woven to regulate railroad reorganizations. Not only have thousands of Rock Island employees been denied the needed protections which Congress has decreed are required by the public interest, but it is clear that as the law now stands, no employee protection will be imposed by a reorganization court or by the ICC in any subsequent entire line abandonment case under the MRRA, the Bankruptcy Code, or the Interstate Commerce Act. *See, In re Auto-Train Corp.,* 11 B.R. 418 (Bk.Ct. D.C. 1981), *vacated,* D.D.C. No. 81-1721, decided October 28, 1981. Moreover, the lack of an

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[15] 11 U.S.C. §§ 1161-1174. Section 1174 of the Code now authorizes the liquidation of a debtor railroad; that provision in the Code, Congress has stated, was a change from existing law under Section 77. S.Rpt. No. 95-989 at 12 (1978).

employee protection obligation in an entire line abandonment case will encourage liquidations of failing railroads rather than their restructuring because liquidations have now become the less expensive alternative.[16]

It is no answer to the dilemma posed for Congress and employees by this case and by the *Susquehanna* decisions to assert that Congress can enact new legislation if it considers this issue to be important. Congress' ability to legislate effectively in this area is now questionable, for the *Susquehanna* case and the decision by the CRI reorganization court have concluded that the Constitution (presumably, the Due Process and Just Compensation Clauses of the Fifth Amendment) prohibits Congress from requiring a liquidating railroad to use any of its "assets for protection payments to employees whose jobs with [the debtor] . . . are no longer in existence by reason of such total abandonment and operational discontinuance." Appendix B-1 at 20a. These constitutional questions, as RLEA explained in its petition to this Court in the *Susquehanna* case (Sup.Ct. No. 81-1715, Pet. at 20-24), have been posed recently by other courts and have been argued to this Court, but have not been answered directly by this Court. Consequently, Congress cannot be assured that the federal courts will enforce whatever regulations it might enact to regulate

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[16] Congress' fear that the lack of an employee protection obligation in major line systemwide abandonments will encourage liquidations is not mere conjecture. The unsecured creditors and the debtor in the Milwaukee Railroad Reorganization proceeding already see the liquidation of that railroad as a desirable goal and have opposed further borrowings which are needed to aid it reorganize. The decisions at bar only serve to encourage their efforts to liquidate rather than to reorganize.

railroad reorganizations. Moreover, as this case and the fate of the employee protective program of RITA [17] clearly show, Congress' purpose in requiring employee protection will be frustrated if its commands are not enforced when the need for those protections arises. RLEA respectfully submits that this area is too important to be left in such a state of great uncertainty.

II. By Disregarding The Clear And Unambiguous Command In Section 17(a) Of The MRRA That Employees Be Protected Whenever a Section 77 Reorganization Court Authorizes An Abandonment, The Lower Courts Have Decided An Important Question Of Federal Law In A Manner Which Conflicts With Applicable Decisions Of This Court

This Court has frequently admonished federal courts that the "starting point" in the construction of a statute is "the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). If that language is clear and unambiguous, the search for the intent of Congress is complete, for there is, "of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Assoc., Inc.*, 310 U.S. 534, 543 (1940). In this case, however, the lower courts have ignored both those admonitions and the plain meaning of Section 17(a) to legislate an exception to the unambiguous command in that Section that: *"In authorizing any abandonment pursuant to this section, the court shall*

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[17] This Court has recently concluded that the employee protective program of RITA was repugnant to the Constitution as being a non-uniform law of bankruptcy. *Railway Labor Executives' Assoc.* v. *Gibbons*, Sup.Ct. Nos. 80-415, 80-1239, decided March 2, 1982.

require the carrier to provide a fair arrangement" to protect employee interests. 45 U.S.C. § 915(a) (emphasis added). Unfortunately, by judicially legislating an exception to the all-inclusive mandatory language of Section 17(a) for entire line abandonments, the court of appeals has thwarted Congress' legitimate exercise of its Commerce and Bankruptcy Clause powers.

When Congress enacted the employee protection requirements in Section 17(a) of the MRRA, it used words which clearly and unambiguously stated that the requirement was mandatory and applied to the authorization of "any abandonment pursuant" to that section. Indeed, by stating that RLEA's position on employee protection was "certainly reflected in the language of the statute" (Appendix A at 10a), the court of appeals implicitly acknowledged that the statute was clear and unambiguous. Federal courts have been instructed to stop searching for the meaning of a statute at that point, for this Court has "historically assumed that Congress intended what it enacted." *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179 (1980). Nevertheless, without even acknowledging the limitations upon its jurisdiction to modify a statute by statutory construction, the court of appeals interpreted that mandatory language as being permissive because, in its view, applying Section 17(a)'s plain meaning would be "contrary to what seems so clearly to be the intent of Congress in enacting" Section 17(a). Appendix A at 10a.

To the detriment of both Rock Island employees and Congress' policies in this area, the court of appeals misconstrued the intent of Congress in enacting Section 17's employee protection requirements. While it is correct that the legislative history of Section 17 shows

that Congress intended that section "to make no change in existing law as it affects employee protection" (H. Rpt. No. 96-583, 96th Cong., 1st Sess. at 27 (1979)), there is not a single statement in either congressional reports or debates on the MRRA which mentions the "entire line abandonment" exception. Any attempt to raise such an ambiguous reference in a congressional report into being an implied exception to language which admits of no exception is contrary to the basic canons of statutory construction. *E.g., TVA* v. *Hill*, 437 U.S. 153, 173 (1978); *United Air Lines, Inc.* v. *CAB*, 569 F.2d 640, 647 (D.C. Cir. 1978). Moreover, such an interpretation of legislative intent is also refuted by both the "existing law" on employee protection and subsequent statements by the same Congress while it was considering this very issue in connection with RITA.

Contrary to the court of appeals' citation of pre-1976 court and ICC decisions upholding the "entire line abandonment" exception to employee protection (Appendix A at 11a), the sole support for the assertion that pre-MRRA "existing law" included such an exception are several decisions by the ICC construing the mandatory employee protection language in 49 U.S.C. § 10903(b)(2). *E.g., Wellsville, A.&G.R.—Abandonment*, 354 I.C.C. 247 (1978). Pre-1976 cases are not relevant because it was not until 1976 that Congress amended the Interstate Commerce Act to make employee protection mandatory in abandonment cases. Section 802, Pub. L. No. 94-210, 90 Stat. 31, 127 (1976) (since recodified as 49 U.S.C. § 10903, *et seq.*). Post-1976 ICC decisions, besides being erroneously decided (*see*, RLEA Pet. at 17-19, *Susquehanna, supra*), are inapposite because they did not involve a major carrier such as the Rock Island. In the only

pre-1976 ICC case involving the potential abandonment of an entire rail system of a major railroad, the ICC specifically rejected the assertion in that case that there should be "the wholesale separation from employment [of railroad employees] without adequate compensation . . . ." *Penn Central Transportation Co.—Reorganization,* 347 I.C.C. 45, 92 (1973).

When it concluded that it was ' clear" that Congress intended an implied exception to exist in this case, the court of appeals ignored post-MRRA statements by the same Congress which enacted the MRRA that it viewed its earlier actions in passing the MRRA as having imposed a mandatory employee protection obligation in this case.[18] While Congress was considering legislation which eventually became RITA, the House Committee on Interstate and Foreign Commerce reported out that legislation in March 1980, and stated:

> During the period of directed service, the bankruptcy court, on January 25, 1980, ordered the Rock Island to be liquidated on the grounds it could not be reorganized. As part of the litigation [*sic*] order, *the Rock Island must obtain a certificate of abandonment from the bankruptcy judge with a fair arrangement for employees* at least as protective of the employees as required under section 11347 of Title 49 of the United States Code.

H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 21 (1980) (emphasis added). The committee's statement was

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[18] RLEA acknowledges that subsequent legislative history forms a hazardous basis for devining the intent of Congress, *Andrus* v. *Shell Oil Co.,* 446 U.S. 657, 666 n.8 (1980); however, such information is instructive in a case such as this where it explains the intent of Congress *before* any court inferred that Congress did not intend such a result.

based upon the knowledge that it had earlier in the MRRA required the imposition of employee protection in this case. Moreover, it was premised upon that interpretation of its own intent that Congress enacted the alternative employee protective program of RITA, 45 U.S.C. § 1005. *Compare,* 126 Cong. Rec. S5806 (May 22, 1980) (Remarks of Sen. Kassebaum), *with,* H. Rpt. No. 96-839, *supra,* at 21-23.

By disregarding the instructions of this Court that the plain language of a statute is to be followed, the lower courts have construed Section 17(a) of the MRRA in such a way that the goals which Congress sought to achieve by the enactment of that provision have been frustrated, both for the Rock Island situation and probably for the future. RLEA respectfully submits that, because the decisions below have had such a debilitating impact on Congress' legitimate attempts to regulate commerce and to discourage railroad liquidations, this Court should review this case.

III. By Concluding That 11 U.S.C. § 1170 Permitted The Rock Island Reorganization Court To Authorize An Abandonment Of The Entire Railroad Without First Conducting An Evidentiary Hearing Into The Validity Of Such An Abandonment, The Lower Courts Have Construed A New Statute In A Manner Which Conflicts With Prior Decisions Of This Court

Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170, provides in two subsections that the reorganization court may authorize an abandonment pursuant to that section only after notice and a hearing. 11 U.S.C. § 1170(a), (c). That hearing requirement is not, petitioner RLEA submits, a mere hortatory provision, but rather, it is a command which seeks both to protect the public interest and to assure that basic due process

guarantees are provided. *Cf, Goldberg* v. *Kelly,* 397 U.S. 254, 267 (1970). Both the reorganization court and the court of appeals concluded, however, that the evidentiary hearing requested by RLEA was unnecessary in this case because of the reorganization court's "total immersion" into the CRI's reorganization (Appendix A at 4a; Appendix B-2 at 27a), and because of the earlier decision that the carrier was unreorganizable. Appendix A at 5a; Appendix B-2 at 27a.

By treating the Rock Island's rights to abandon its entire system as being justified by the prior reorganization proceedings, and as being compelled by the earlier decision to liquidate, the lower courts have deprived the abandonment authorization requirement of any substantive merit; that requirement has become a mere "procedural requirement" (Appendix A at 5a) which is simply a "technical recognition" of what has previously been ordered. Appendix B-2 at 27a. That emasculation of the need for abandonment authority clearly conflicts with prior decisions of this Court which have required such authority before a carrier ceased operations, even in the face of an erosion of the debtor's estate. *E.g., New Haven Inclusion Cases,* 399 U.S. 392, 461 (1970); *Palmer* v. *Massachusetts,* 308 U.S. 79, 87-88 (1939).

This Court has long recognized that the public's interest in continued rail transportation is not to be ignored merely because a railroad enters reorganization under Section 77.[19] Indeed, this Court has consistently held that the protection of the public's in-

[19] The new Bankruptcy Code has not changed this principle for 11 U.S.C. § 1165 infuses the public interest into railroad reorganizations under the Code.

terest in continued rail service is one of the dual objectives of Section 77. *E.g., New Haven Inclusion Cases, supra,* 399 U.S. at 431. While it is correct that a "carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage" (*Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U.S. 396, 399 (1920)), it is also well accepted that the "public interest is not merely a pawn" to be sacrificed to the private interests of the creditors and debtor. *E.g., Penn-Central Merger Cases,* 389 U.S. 486, 511 (1968). As the Seventh Circuit recently summarized in another case involving the Rock Island:

> When the continuation of rail service is essential for the protection of the public interest, the courts have . . . determined that the shareholders' right to realize the value of the property may be held in abeyance for a reasonable period while a solution, acceptable to both the public and private interests, can be devised.

Gibbons v. *United States* [hereinafter, *"Gibbons II"*] 7th Cir. Nos. 79-2413, *et al.,* decided October 7, 1981, slip op. at 20.

The abandonment process is one method by which that solution can be devised, *Palmer* v. *Massachusetts, supra,* and thus, it is clear that a carrier, even a cashless one such as the Rock Island, cannot withdraw its assets from the railroad business until it obtains regulatory approval to abandon its operations. *E.g., New Haven Inclusion Cases, supra,* 399 U.S. at 461; *Gibbons* v. *United States* [hereinafter, *"Gibbons I"*], 660 F.2d 225, 229 (7th Cir. 1981). However, in viewing the purpose to be served by requiring abandonment approval before actually liquidating, it must be borne in mind that Section 77 places the primary responsibility for

devising the solution acceptable to the public upon the ICC under Section 77(d). *Ecker* v. *Western Pac. R.*, 318 U.S. 448, 468 (1943). Moreover, it should also be remembered that unless a line of railroad authorized to be abandoned is sold or leased for continued rail usage, there is no bar to the scrapping of that line. Since Section 77(d) has been bypassed in this case, the abandonment process, with all of its dangers, was the sole mechanism available to the public to assure that rail lines which could be preserved for rail usage were in fact saved.[20]

By denying RLEA the right to challenge the validity of the solution recommended by the ICC, the lower courts have deprived the abandonment authority process of its reason for existing. If, as the courts below have concluded, the abandonment authority is simply a technical recognition of the liquidation order, then there is no justification for holding in abeyance the shareholders' right to realize the value of their property while that procedural formality is being obtained. Indeed, one court has already reached such a conclusion. *In re Auto-Train Corp., supra.* But yet, it is well settled that the abandonment process does hold those rights in abeyance. *Gibbons II, supra; Gibbons I, supra,* 660 F.2d at 229. If that process is to retain its substantive validity under Section 1170 of the Bankruptcy Code, then the hearing requirement must call for an actual evidentiary hearing when an interested party challenges the justification to abandon all rail lines of the debtor, especially those which the ICC has concluded are essential to the communities served by those

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[20] The danger of not examining closely the validity of an abandonment order encompassing lines which are clearly essential to affected communities is evident from this case. *See,* note 4, *supra,* at 6.

lines. The decisions below have substantially jeopardized Congress' intent that the abandonment process retain its integrity under both the MRRA and the Bankruptcy Code.

CONCLUSION

For the reasons set forth herein, Petitioner Railway Labor Executives' Association respectfully requests that a Writ of Certiorari be issued to review and to reverse the Judgment of the Seventh Circuit.

Respectfully submitted,

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Dated: March 30, 1982

APPENDIX A

Unpublished Order—Not To Be Cited
Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

(Argued: June 10, 198[1])*

October 13, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. EAST, Senior District Judge*

Nos. 80-1788, 80-2199 and 80-2286

IN THE MATTER OF: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*

APPEALS OF: RAILWAY LABOR EXECUTIVE [*sic*] ASSOCIATION (RLEA), *Intervenor.*

Appeals from the United States District Court for Northern District of Illinois, Eastern Division.

Nos. 75-B-2697 Frank J. McGarr, Judge.

ORDER

Proceedings to reorganize the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") under Section

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* The Honorable William J. East, Senior District Judge of the District of Oregon, is sitting by designation.

[* On October 22, 1981, the Court of Appeals issued an Order, *sua sponte*, amending this per curiam order in several respects. This per curiam order has been printed as amended with the insertions being indicated by [ ]. The Order of October 22nd has been reproduced herein as Appendix A-1]

77 of the Bankruptcy Act of 1938, as amended, 11 U.S.C. § 205 (1976), have been pending before the reorganization court since March 12, 1975 [*sic*]. From the date the petition for reorganization was granted, through September 26, 1979, the Rock Island was operated under the direction of William Gibbons (the "Trustee") while attempts were made to devise an income-based reorganization. On September 26, 1979, the Rock Island was declared cashless by the Interstate Commerce Commission ("I.C.C."), and it ceased operation as a railroad carrier. On January 25, 1980, after reviewing a Plan of Reorganization submitted by the Trustee, an independent consultant's analysis of the Plan and other submissions, the reorganization court concluded that the core operation proposed by the Trustee was not feasible and ordered the Trustee to file a plan which would provide for the total liquidation of the estate.

On April 14, 1980, the reorganization court entered an order directing the Trustee to file an application with the I.C.C. "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other operating entities for their operation thereof." In a report filed on May 23, 1980, in response to the Trustee's application for abandonment, the I.C.C. concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is [*sic*] required by the public convenience and necessity."

On June 2, 1980, the reorganization court held a hearing concerning the proposed abandonment, and ordered systemwide abandonment of the Rock Island's lines and discontinuance of its service.

The RLEA had earlier appealed from the district court's orders authorizing liquidation of the Rock Island. In an unpublished order dated February 11, 1981, this court affirmed the order of the district court, holding that "the reorganization court had the jurisdiction under § 77 to decline to accept the Trustee's Plan and to order the Trustee

to formulate a plan of liquidation. Furthermore, the reorganization court properly exercised its jurisdiction."

The present appeal challenges the systemwide abandonment order of June 2, 1980, and, in particular, its treatment of the labor protection issues. We affirm.[1]

I.

Appellants maintain that the reorganization court's June 2, 1980, order authorizing systemwide abandonment should be reversed because the court failed to (1) conduct an adequate evidentiary hearing, (2) consider the public interest, and (3) provide labor protection.

A. Evidentiary Hearing

Section 17 of the 1979 Milwaukee Railroad Restructuring Act ("MRRA") empowers reorganization courts proceeding under § 77 of the Bankruptcy Act of 1938 to "authorize the abandonment of lines of railroad pursuant to section 1170 of title 11." 45 U.S.C. § 915(a) (Supp. III 1979). Section 1170 of the new Bankruptcy Act provides, in relevant part:

> (a) The court, after notice and a hearing, may authorize the abandonment of a railroad line if such abandonment is—
>
> (1) (A) in the best interest of the estate; or
>
> (B) essential to the formulation of a plan; and
>
> (2) consistent with the public interest.

11 U.S.C. § 1170 (Supp. III 1979).

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[1] The RLEA also challenges the reorganization court's alleged failure to protect the interests of Rock Island employees in its orders authorizing the sale of Rock Island properties to the St. Louis Southwestern Railway Company ("SSW" sale) and to the Missouri Pacific Railroad Company ("Mo-Pac" sale). For the reasons stated in Part II, *infra*, we dismiss RLEA's appeals from these orders as moot.

The phrase "notice and a hearing" is defined in § 102(1) of the new Bankruptcy Act as follows:

> In this title—
>
> (1) "after notice and a hearing", or a similar phrase—
>
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances . . .

11 U.S.C. § 102(1) (Supp. III 1979).[2]

Thus, to determine whether Judge McGarr provided an adequate evidentiary hearing in authorizing abandonment of the Rock Island, we must consider the particular circumstances of the case, for the issues addressed at the June 2 hearing were anything but new to the reorganization court, which had been totally immersed in the Rock Island's affairs since March 17, 1975. This process of immersion provided indoctrination in a somewhat lengthy history, informed from time to time by hearings leading to: the Commission's finding in September 1979 that the Rock Island was "cashless"; the court's rejection of the Trustee's plan of reorganization in January, 1980; the recommendation of the court's independent consultant and the court's finding that the Rock Island was incapable of reorganization; the I.C.C.'s recommendation that the Trustee be permitted to abandon all lines because "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity"; and, finally, the court's liquidation order. Additionally,

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[2] Congress has provided the gloss that "after notice and a hearing" as defined in § 102(1) means "after such notice as is appropriate in the particular circumstances (to be prescribed by either the Rules of Bankruptcy Procedure or by the court in individual circumstances that the Rules do not cover . . .)." H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 315 (1977), *reprinted in* [1978] U.S. Code Cong. and Ad. News 5963, 6272.

numerous status hearings were regularly held and reports were filed by the Trustee, all of which were a part of the five-year record before Judge McGarr. We believe that, in evaluating this detailed and instructive history of five years' duration, the court, in the exercise of its discretion, did not err in concluding that, under the particular circumstances before it, an additional evidentiary hearing was not required.

But, there is another reason for our conclusion. RLEA was seeking an evidentiary hearing to determine essentially whether the Rock Island was reorganizable—a question that had been previously decided in the negative by the reorganization court in its January 25, 1980, liquidation order. In affirming that order, this court determined that the reorganization court had jurisdiction to order the Trustee to prepare a plan of total liquidation and that the court "properly exercised its jurisdiction" in so ordering. Thus, by June 2, 1980, it had already been decided that the Rock Island was unreorganizable and should be liquidated. And the systemwide abandonment ordered on June 2, in effect, fulfilled an important procedural requirement which was based in large measure on substantive decisions that had already been made. But liquidation could not proceed until abandonment was authorized since, without abandonment authority, the Rock Island was not relieved of its common carrier obligations. *See Gibbons* v. *Chicago, Rock Island & Pacific R. Co.* [*sic*], Nos. 79-2413, 80-1111, 80-1383 and 80-1538, slip op. at [11-16] (7th Cir. October, 1981). Under all these circumstances, a further evidentiary hearing would therefore have served no useful purpose.

B. Public Interest

RLEA urges that the reorganization court failed to consider adequately the public interest in authorizing systemwide abandonment. One purpose of a § 77 reorganization court is unquestionably to preserve the debtor "as a living,

not a dying, railroad structure." *Van Schaick* v. *McCarthy*, 116 F.2d 987, 993 (10th Cir. 1941). And, to this end, the reorganization court is required to "balance the conservation of debtors' assets for the benefit of the creditors with the preservation of an ongoing railroad in the public interest" to obtain, if possible, "rehabilitation of the enterprise pursuant to a plan of reorganization." *Matter of Lehigh Valley R. Co.*, 558 F.2d 137, 147 (3rd Cir. 1977). But, in the case before us, the interests of the creditors had been to a significant degree subordinated for four and one-half years while the Trustee attempted to develop a workable plan for income-based reorganization of the Rock Island. The plan for a core operation, as finally developed by the Trustee, was found to be infeasible by a court-appointed independent consultant; and, after a hearing at which the creditors and the Federal Railroad Administration (with the apparent acquiescence of the I.C.C.) argued against any core reorganization, the district court ordered total liquidation of the estate.

As a necessary aspect to such a plan, the reorganization court ordered the Trustee to file an application with the I.C.C. to "confirm the abandonment of the Rock Island's total railroad system." As already noted, the I.C.C. advised the court in response to the Trustee's request that "abandonment of the Rock Island is required by the public convenience and necessity," a recommendation endorsed by the United States Department of Transportation at the June 2, 1980, hearing.

Section 1170 of the new Bankruptcy Act, which permits the reorganization court to authorize an abandonment only if such an abandonment is "consistent with the public interest," provides that the Trustee must initiate an abandonment application before the I.C.C. 11 U.S.C. § 1170(b) (Supp. III 1979). The Report of the Senate Committee on the Judiciary states the purpose of this provision:

> Subsection (b) permits some participation by the Interstate Commerce Commission in the abandonment

> process. The Commission's role, however, is only advisory. The Commission will represent the public interest, while the trustee and various creditors and equity security holders will represent the interest of those who have invested money in the enterprise. The court will balance the various interests and make an appropriate decision.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 137 (1978). *Accord,* H.R. No. 95-595, 95th Cong. 2d Sess. 423-24 (1978). The statutory scheme thus vests in the I.C.C. the responsibility of representing the public interest, and the district court did not abuse its discretion in approving the I.C.C. recommendation that abandonment was required by the public interest. As we stated in our February 11, 1981, order affirming liquidation of the Rock Island, the reorganization court has been sensitive to the public interest throughout the six-year history of the Rock Island reorganization:

> The RLEA claims that since the creditors have enjoyed the benefits of having a single resolution of all claims, rather than many receiverships, they should bear the burden of serving the public interest by keeping their property invested in rail service. But the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization proceedings and has determined that continued operation of the Rock Island no longer serves the public interest considerations required by Section 77.[3]

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[3] We held in our February 11, 1981, order that the district court properly exercised its jurisdiction in ordering complete liquidation of the Rock Island. As noted above, the systemwide abandonment order is a critical component of the liquidation plan and flows necessarily from it. As we stated in *Gibbons:*

> [V]iewed as a matter of economics, abandonment represents the final state in the carrier's passage from operation to liqui-

RLEA suggests that the district court failed to properly consider the public interest because it did not adequately provide in the abandonment order for measures to assure that Rock Island lines would be sold to provide for continued rail usage instead of being dismantled and sold as scrap. But the reorganization court, in accordance with the recommendation of the I.C.C., directed the Trustee not to scrap or otherwise dispose of some 2,807 miles of track for a period of 180 days following the June 2, 1980, abandonment order. This period was subsequently extended by an additional four months. We do not believe the court abused its discretion in declining to prohibit for a longer period the dismantling of these specified Rock Island pro-

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dation. If the financial condition of the railroad becomes so desperate that it is unable to continue operations (and is cashless [to which we now add, and unreorganizable]), the burden may be eased somewhat through the imposition of directed service. Some losses continue, however, at least until the certificate of abandonment issues and the public service obligation terminates. At this critical point, the trustee may begin to liquidate railroad property and realize in an important way the value of the railroad assets. Very significantly, petitioners do not argue here that a condition of cashlessness, no matter how severe or disabling, would in and of itself authorize a railroad to commence the liquidation of its property. It goes without saying that the Rock Island, although cashless and unable to provide service through its own efforts [and unreorganizable] had no authority to proceed to liquidation. That right accrues only upon the termination of the carrier's public service obligation through the issuance of a certificate of abandonment by the ICC [or, here, through the authorization of abandonment by the reorganization court pursuant to § 17(a) of the MRRA].

Gibbons v. Chicago, Rock Island and Pacific R. Co. [*sic*], *supra,* slip op at [15-16].

perties or in failing to place more track under similar restrictions.[4]

C. Labor Protection

Appellant argues that the district court, in authorizing systemwide abandonment, failed to provide for payment of labor protection in accordance with § 17(a) of the MRRA, which provides in relevant part:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49.

45 U.S.C. § 915(a) (Supp. III 1979).

RLEA argues that since the labor protection obligation set forth in § 17(a) applies to "any abandonment," the

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[4] By order [*sic*] 297 entered December 1, 1980, the reorganization court directed:

> 1. That William M. Gibbons, the Trustee herein, be and he is hereby directed, for the period up to and including March 31, 1981 not to scrap, dismantle or otherwise dispose of those rail properties owned by the estate for which he has received expressions of interest, offers to purchase, or is negotiating for sale or lease to parties or entities for continued rail use.
>
> 2. That until the Court's further order, all persons, firms or entities are restrained from physically or otherwise interfering with, or in any manner whatsoever disturbing or affecting the rail properties or rail interest owned by the estate and whose abandonment has been confirmed by this Court's previous orders.

Paragraph 2 of this order has not been altered or amended by the reorganization court, and the trustee informs us that he advised the reorganization court on March 31, 1981, that no dismantling would take place without prior notice to the court. The reorganization court is thus able to continue to consider the public interest in continued rail operations as the liquidation of the Rock Island proceeds.

district court was required to provide such protection in authorizing systemwide abandonment of the Rock Island. RLEA's position is certainly reflected in the language of the statute. But it is contrary to what seems so clearly to be the intent of Congress in enacting § 17a [*sic*]. Section 17(a) was designed to expedite abandonment procedures for a railroad in reorganization by empowering § 77 courts to approve abandonments, a power that had been previously vested in the I.C.C.[5] However, as stated in the Conference Report accompanying the MRRA, § 17a [*sic*] was *not* intended to work a "change in existing law as it affects employee protection." H.R. Conf. Rep. No. [*sic*] 96th Cong., 1st Sess. 27 (1979), and the existing law regarding labor protection includes the long established I.C.C. practice of denying labor protection in total abandonments.

Before enactment of § 17(a), approval by the I.C.C. in the form of a certificate authorizing abandonment was required before a railroad in reorganization under § 77 could abandon a line of track. 49 U.S.C. § 1a(1)(1976). Each certificate of abandonment was required by § 1a to include "provisions for the protection of the interests of employees at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this title and pursuant to section 565 of title 45." 49 U.S.C. § 1a(4) (1976).[6]

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[5] Section 17(a) applies to cases commenced under § 77 prior to enactment of the Bankruptcy Reform Act of 1978; 11 U.S.C. § 1170 (Supp. III 1979) transferred authority to authorize abandonments from the I.C.C. to the reorganization court for reorganizations commenced after enactment of the new Bankruptcy Act.

[6] The sections cross-referenced in § 1a(4) quantified the protection to be paid to employees displaced as the result of a merger or consolidation of rail carriers, 49 U.S.C. § 5(2)(f) (1976), or as the result of a discontinuance of intercity rail passenger service, 45 U.S.C. § 565 (1976). Those provisions quantified the level of protection by requiring the payment of displacement or dismissal

This provision was recodified in the revised Interstate Commerce Act of 1978, without substantive change, as 49 U.S.C. § 10903(b)(2) (Supp. III 1979). Section 10903(b)(2) reads are [*sic*] follows:

> On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title [formerly § 5 (2)(f)] and section 565(b) of title 45.

49 U.S.C. § 10903(b)(2) (Supp. III 1979).

Although both § 1a and § 10903(b)(2) on their face require labor protection to be provided in connection with "each certificate" authorizing abandonment, it had long been the policy of the I.C.C. to deny labor protection in systemwide abandonments. *See, e.g., Bush Terminal R. Co. Entire Line Abandonment,* 342 I.C.C. 34, 51 (1971); *Rutland R. Corp. Abandonment,* 317 I.C.C. 393 (1962), *aff'd sub nom., Brotherhood of Locomotive Engineers v. United States,* 217 F. Supp. 98 (N.D. Ohio 1963). And, when Congress recodified § 1a in § 10903(b)(2) of the revised Act, it approved this policy of the I.C.C., stating that it acted

> without intention to change the policy and practice of the Commision [*sic*] in connection with certificates involving total termination of service by a railroad company.

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allowances to affected employees equivalent to their wage level prior to the consolidation or discontinuance, adjusted to reflect subsequent wage increases, for a period of six years. *See, e.g., New York Dock Railway v. United States,* 609 F.2d 83 (2d Cir. 1979), *aff'g* 360 I.C.C. 60 (consolidation of two rail carriers); *Oregon Short Line Railroad—Abandonment (Goshen),* 360 I.C.C. 666 (1980) (partial abandonment).

S. Rep. No. 94-499, 94th Cong. 2d Sess. 218 (1976). We are persuaded that, in the enactment of § 17(a), the applicability of this body of law was similarly preserved. *See* H.R. Conf. Rep. No. 96-583, 96th Cong. 1st Sess. 27 (1979) (quoted *supra*).

The body of law thus preserved by Congress in § 17(a) is described by the I.C.C. in its abandonment report in this case. That report reads in pertinent part as follows:

> Employee Protection. RLEA urges that we recommend employee protection at a level greater than required by New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). *New York Dock* protection is apparently mandated by section 17(a) of the MRRA. However, under that section the duty to impose employee protection rests squarely with the bankruptcy court. We will make no recommendation, but will point out certain options that the Court has.
>
> The *New York Dock* conditions can be imposed on the Rock Island. However, another viable option is not to impose any form of labor protection. In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted. *See, Wellsville, Addision* [*sic*] *& Galeton R. Corp.—Abandonment*, 354 I.C.C. 744, 746 (1978).

In the recent case of *Oregon Short Line Railroad—Abandonment (Goshen)*, 360 I.C.C. 666, 667 (1980) [*sic*], the I.C.C. for the first time imposed *New York Dock* conditions on a partial abandonment. The Commission expressly recognized the distinction between partial and total abandonments, however, and stated that its decision to impose such labor protective conditions would apply "on all rail abandonment proceedings, except for entire line abandon-

ment." *See also New York Susquehanna & Western Railroad Co.*, 504 F. Supp. 851 (D.N.J. 1980).[7]

In sum, we believe that Congress intended a perpetuation of past practice that labor protection requirements were not applicable to abandonments of whole railroads leaving no rail carrier affiliates still operating. The district court therefore properly declined to provide labor protection in connection with the total abandonment of the Rock Island.

II.

By an agreement dated June 21, 1978, the Trustee agreed to sell approximately 1,000 miles of track running from Santa Rosa, New Mexico to St. Louis, Missouri, via Kansas City, Missouri to the Southern Pacific Transportation Company ("SP")[8] for approximately $57 million. The reorganization court authorized the Trustee to seek approval of this sale from the I.C.C. and, after 99 days of hearings in which RLEA participated, the I.C.C. approved the proposed transaction in a decision dated June 6, 1980. On July

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[7] The policy considerations underlying this distinction were set forth in *Northampton & Bath Railroad Co. Abandonment*, 354 I.C.C. 784, 785-56 [*sic*] (1980):

> After the entire line of a railroad is abandoned no operating carrier remains to enjoy the benefits of the abandonment or pay the cost of employee protection. The Commission has generally refused to impose employee protective conditions which would in effect, require continued operations for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease. The conditions imposed by the review board, those developed in *Oregon Short Line*, are not appropriate for an entire line abandonment where the abandoning railroad has no rail carrier affiliate which continue[s] operations similar to its own.

[8] SP assigned its rights under the agreement to its affiliate, SSW, on November 27, 1978.

31, 1980, the reorganization court, after a hearing, approved entry of the sale.

On March 22, 1980, the Trustee agreed to sell approximately 38 miles of line between Haskell and Hot Springs, Arkansas, to Mo-Pac for approximately $2 million.[9] On May 8, 1980, the reorganization court preliminarily approved the sale and authorized the Trustee to seek I.C.C. approval. On July 14, 1980, the I.C.C. rendered its decision approving the transaction. The district court approved the sale on July 21, 1980, and denied RLEA's motion for reconsideration on July 31, 1980.

On appeal, RLEA challenges the sufficiency and scope of the labor protection provided in connection with the SSW and Mo-Pac transactions. RLEA did not obtain a stay of the July 21, 1980 and July 31, 1980 orders, however, and its appeals are therefore moot by virtue of Bankruptcy Rule 8-703(a)(6), which describes the effect of an appeal from an unstayed order in reorganization cases:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

In *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, (Appeal of Montana Dept. of Agriculture, et al.), No. 80-1745 (7th Cir. February 13, 1981), this court applied

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[9] The agreement provides in part that:

> MoPac and Rock Island shall each have the right in its sole discretion to terminate this agreement if any court, agency, or any other governmental authority with jurisdiction over this transaction shall order any material changes in this agreement or otherwise impose any material requirements on MoPac or Rock Island as a condition to any necessary approval.

Rule 8-703(a)(6), holding that the State of Montana's appeal from the Milwaukee reoganization [*sic*] court's approval of the sale of certain abandoned property was moot for failure to obtain a stay. RLEA attempts to distinguish the *Montana* case on the ground that SSW and Mo-Pac, unlike the purchaser in *Montana*, were not "good faith purchasers" within the meaning of Rule 8-703(a)(6) because they were "directly involved in the dispute before the reorganization court." Appellant's reply brief at 22. But there are no allegations of dishonesty, fraud, or unfair dealing in the cases before us, and it appears that SSW and Mo-Pac paid reasonable value for the purchase of the abandoned properties. We cannot accept the argument that Mo-Pac and SSW are not good faith purchasers simply because they were interested parties.

RLEA also argues that, since it was not challenging the *concept* of the Mo-Pac and SSW sales, but rather only the *terms* under which the Trustee agreed to sell to Mo-Pac and SSW and the terms under which Mo-Pac agreed to purchase, it did not stand any reasonable chance of success in obtaining a stay of the reorganization court's orders. Since RLEA did not even attempt to seek a stay, however, this argument is entirely speculative. Moreover, since the provision of labor protection is an aspect of the reorganization court's orders approving the sales, we do not agree that RLEA (which presumably had standing to appeal from these orders) could not reasonably have sought a stay of the orders pending appeal.

RLEA also argues that Rule 8-703(a)(6) does not moot these appeals because the relief it seeks would not "affect" the sales within the meaning of the rule. However, the reorganization court's orders approving the sales defined the labor protection obligations that were to be required in connection with the sale. If this court were to reverse these orders and require that future approval of the sale agreements be conditioned on imposition of the potentially sub-

stantial additional labor protection obligations urged by RLEA, the Trustee might well be required to attempt to unwind these transactions, since they might not be in the best interest of the estate if they were conditioned on substantial additional labor protection obligations. Such an *ex post facto* revision of the economic burdens of the sales (and the corresponding need to unwind the transactions) would frustrate Rule 8-703(a)(6)'s policy of insuring the finality of sales to "good faith holders."

We therefore dismiss RLEA's appeals from the orders approving the sales to Mo-Pac and SSW as moot. With respect to the appeal from the systemwide abandonment order of June 2, 1980, we affirm.

APPENDIX A-1

Unpublished Order—Not To Be Cited
Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
October 22, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. EAST, Senior District Judge*

Nos. 80-1788, 80-2199 and 80-2286

IN THE MATTER OF: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*

APPEALS OF: RAILWAY LABOR EXECUTIVES' ASSOCIATION (RLEA), *Intervenor.*

Appeals from the United States District Court for Northern District of Illinois, Eastern Division.

No. 75-B-2697 Frank J. McGarr, *Judge.*

ORDER

IT IS ORDERED by this Court, sua sponte, that the Unpublished Order dated October 13, 1981, be, and the same is amended to reflect the following:

The oral argument date on the first page of the order should be June 10, 1981, not June 10, "1980" as indicated.

On page 4 of the order, the reference to *Gibbons v. Chicago, Rock Island & Pacific R. Co.,* is at pages 11-16 of the slip opinion and the reference on page 6 can be found at pages 15-16 of the slip opinion. This was inadvertently omitted from the order when issued.

APPENDIX B

APPEAL NO. 80-1788

In re Chicago, Rock Island
And Pacific Railroad Co.

APPEAL OF
Railway Labor Executives' Association

ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION AND RELATED MATERIALS

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor.*

In Proceedings for the Reorganization of a Railroad

ORDER NO. 248

This cause coming on as the hearing heretofore set by this Court by its Order No. 232 entered April 14, 1980, upon the Motion filed by William M. Gibbons, the Trustee herein and by the Indenture Trustees and the Henry Crown et al. intervenor interests and upon the direction of this Court to the said Trustee herein to file an application with the Interstate Commerce Commission for its report confirming the abandonment of the Debtor's ("Rock Island") total railroad system, the said application to be filed as described in Section 17 of the Milwaukee Railroad Restructuring Act (MRRA) and Section 1170 of the Bankruptcy Code, and

It appearing to the Court that the Interstate Commerce Commission has filed its report dated May 23, 1980 containing its advisory recommendations as prescribed under Section 17 of the MRRA as aforesaid and recommending total system discontinuance of service and abandonment, subject only to service continuity by other carriers at certain defined points and segments pending possible transfer or sale to such carrier or other entities who may desire to continue such rail service, and

It further appearing to the Court that due notice of the hearing set has been given by the Trustee as prescribed by the Court in its Order No. 232, and the Court and having

fully considered the report of the Interstate Commerce Commission, as well as the written comments of various parties in interest including those of various shippers, federal, state and local agencies and the Railway Labor Executives Association, as well as the legal memoranda submitted by the Trustee and creditors of this estate as well as by the Railway Labor Executives' Associates [*sic*], and

The Court having found that Rock Island's unconditional discontinuance of service and its total system abandonment is [*sic*] constitutionally mandated and having further found that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920); and

The Court having further found that labor protective conditions or arrangements are not required of Rock Island's estate pursuant to Section 17 of the MRRA by reason of Rock Island's systemwide termination of operations and total line abandonment which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. *Montpelier & Barre Railroad Co. Abandonment* (Dkt. No. AB-202 F) —— I.C.C. —— (1980); *Northampton & Bath Railroad Co. Abandonment*, 354 I.C.C. 784 (1978); *Wellsville, Addison & Galeton Railroad Corp. Abandonment*, 354 I.C.C. 744 (1978); *Tennessee Central Railway Co. Abandonment*, 333 I.C.C. 443 (1968); *Okmulgee Northern Railway Co. Abandonment*, 320 I.C.C. 637 (1964); *Rutland Railway Corp. Abandonment*, 317 I.C.C. 393 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers v. United States*, 217 F. Supp. 98 (N.D. Ohio 1963); *Chicago, Attica & Southern Railroad Co. Abandonment*, 261 I.C.C. 646 (1946), and, that consistent with ICC precedent, with the Rock Island's constitutional

right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate; and

The Court being fully advised in the premises,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the total systems abandonment of Rock Island's lines and the discontinuance of all of its rail services and obligations as a common carrier is [*sic*] hereby confirmed and decreed, such abandonment to be consistent, however, with the recommendations of the Interstate Commerce Commission pertaining to the transfer, sale or disposition of track and trackage rights as contained in the report of the Commission dated May 23, 1980; provided, however, that the reasonable period within which the Trustee shall retain the lines designated in Appendix D to the ICC Report shall not exceed 180 days from the date of this Order. That in entering this order, the Court is cognizant that a further order may be required with respect to passenger commuter service pursuant to Section 120 of the Rock Island Transition and Employee Assistance Act.

2. That no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court pursuant to Section 17 of the Milwaukee Railroad Restructuring Act and the Trustee is hereby directed not to pay any such claim or to borrow for such purpose, any and all such claims or arrangements being hereby denied and prohibited by the Court.

Enter
/s/ FRANK J. MCGARR
U.S. District Judge

Dated June 2, 1980

APPENDIX B-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

IN THE MATTER OF: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday the 2nd day of June, 1980, at the hour of 2:30 o'clock p.m.

• • • •

[60] THE COURT: In connection with the form of the order and in particular to the paragraph that counsel has raised, I'll allow some time to work out some restructuring of that, if it is determined that it should be necessary.

I've read a lot and I've heard a lot, and I appreciate the fact that those of you who spoke could have covered much more ground, but have presumed that I'm familiar with much of what you were going to say, and I appreciate the fact that many of you who are here because your appearance was preceded by communications from the Court and you and your clients refrained from repeating what was in those communications.

Preliminary, I suppose I should publicly thank Judge McMillen for changing his hearing so that we could have this one.

[61] What we're about today is really a hearing on an earlier made motion to confirm the discontinuation of the

railroad operations of the Rock Island. It was continued until today to await the I.C.C. report and recommendations on the subject, which we now have, and I commend the I.C.C. for doing such a fine report in such short time, to give the various creditors an opportunity to express their views, as they have, the various states and other interested private parties to express their view, which they have. I've heard a lot and I intend to rule on that motion, and I intend these remarks to be my ruling and an explanation of whatever order I ultimately sign, and since I'm in a sense shooting from the hip in a very complicated matter, I apologize if the observations are not as tidy or as well structured as they might otherwise be.

Preliminary, let me say that I have had many expressions of what might be called the public interest side of this case in the form of letters, telegrams, communications of all kinds. I had a letter from a governor handed to me today, I have another telegram from a governor of another one of the effected states. These are things that no Court ignores, because I am as sensitive to the public interest as I suppose anyone else in the proceeding. I'm sure the creditors would be willing to sign affidavits [62] that they think I have been over zealous in protecting the public interest by letting the Rock Island operate as long as I did. But, the public interest has been my concern for five years and it's my concern now.

On the other hand, this is a bankrupt business, and private creditors cannot forever support the on-going operations at a loss, of a railroad in service of the public interest, and the time when those operations have to cease, because of the rights of the creditors, is a time which has come and a time which has passed.

So, as to the current on-going operations of segments of the Rock Island Railroad, I want to make sure the record is clear that despite the fact that I agree completely with what the Commerce Commission has done by way of di-

rected service, the current operations are not my doing, they are the result of directed service orders or other carriers operating under leases pending negotiation for sale. This is in the public interest. I'm glad that it's happening, but the Rock Island is operating nothing, and it hasn't been operating anything for some considerable time, because it has been my decision, and continues to be, that the continued operation of the Rock Island has passed that point where it is mandated by the public interest and is such a serious financial disservice to the creditors that it was terminated and had to be terminated.

[63] Now, this affects a lot of people, and the unhappy effect upon the economy, upon labor, upon those private businesses which rely on the services of the Rock Island are very, very regrettable. I suppose it's true, as true in any other industry as in the automobile industry today, when an employer reduces operations or ceases operations, there is a serious public impact. But, it's a public impact which, however regrettable, can no longer be the subject of any further concern on the part of the Court. I have tried to explain that my concern has dictated very much many of the orders I've entered in this case over the years, but that public interest can no longer be a dominant factor in consideration of the future of the Rock Island.

Another way of saying it is that the Commerce Commission, which is charged more heavily with the public interest than I, has studied this situation and has, in effect, done whatever could be done for the public interest in the present posture of the Rock Island and has made various recommendations to the Court, which I have received.

We come to the question of the interest of labor. Once again, a most regrettable situation that people lose their jobs because a business stops. But, as to the suggestion

that Section 17 of the Milwaukee Restructuring Act mandate [*sic*] labor portection in the Rock [64] Island case, this is a suggestion which I must reject for reasons which I will comment upon in a little greater detail later. I do not read in Section 17 of that Act any applicability to the Rock Island case and the total abandonment, systemwide abandonment of a railroad.

What the new Rock Island legislation signed by the President mandates remains to be determined, and I'm not commenting on that now.

Another avenue of very great interest, a form of the public interest, has been expressed by the attorneys from Iowa and Kansas and Texas, and their argument is that I should postpone abandonment of those lines for which bona fide purchase offers have been made, or, to put it another way, I should postpone abandonment of some of those segments of the Railroad for which express consideration has been given by the I.C.C., but which are not included in the Appendix D of the Commerce Commission report.

I have been awaiting bona fide offers for purchases of a variety of segments of this line for many months, and there have been not many forthcoming. I've really come to suspect that other persons who might be interested, other railroads, private business, these states, have not moved too quickly because they have been waiting for abandonment and distressed sale prices. I recognize [65] problems created by the cessation of service in many area [*sic*] but I have not seen any rush to come up with the money, the means, the know how to offer to purchase or lease segments of the line and continue their operations, or even to enter into bona fide purchase negotiations. There are some few offers pending that I'm sure are bona fide offers, and I do intend to provide for those in a way that will be made clear as we work out a final form of this order.

Abandonment is really only a technical recognition in this case of what I might have previously ordered and what has actually happened. I assert, despite arguments to the contrary, that I have jurisdiction to order total system abandonment, and I have intended to do so and I intend today to confirm that abandonment based upon that jurisdiction. Section 17 of the Milwaukee Act and its labor protection provisions contemplate less than entire system abandonment in imposing labor protection obligations, and that section does not apply here. Even if the Milwaukee Restructuring Act and Section 17 of that Act is not legally infirm in other respects, it is not intended to control the situation I face.

The RLEA has made an argument, and I must commend the young man who made it for impressibly arguing his point, that there should be notice and hearing, not [66] emphasis on notice, but emphasis upon hearing, on hearing aspect of giving everybody an opportunity evidentiary-wise to give the Court input into the decision we're making today. Well, in a sense there has been notice, this hearing has been noticed, and anything filed I have considered and I've listened to everybody today, but in a broader sense, as one of the creditors argued, I've been holding hearings on the subject of abandonment of the Rock Island for five years. Five years of arguments, reports, surveys, audits, plans, Commerce Commission recommendations, all with a view towards assisting me in making the ultimate determination as to whether the Rock Island could be reorganized in any viable way or whether the Rock Island must be abandoned, and I've had all the hearings I have to have or need to have on the subject of the need and desirability of an order to discontinue operations.

I have determined, based on all of these hearings, that there's nothing left which can be reorganized into an operating Rock Island Railroad, and that those smaller segments of the total Rock Island System which are suscepti-

ble to viable operations are susceptible only to viable operations by some other railroad and not within any structure that we can make of the existing Rock Island System.

[67] The jurisdiction is mine to exempt certain lines from the abandonment order for a short time, and I have been asked to do so and, as I said, pending hearings, the I.C.C. has considered this question and has listened, I am sure, and has read as many of the same arguments as I have heard today and many of the pleadings before me, and the I.C.C. has twice made its public interest determination, once in determining those lines subject to a directed service order, and secondly, in terms of the content of Schedule D, or Appendix D to their current recommendations.

The I.C.C. are the experts. They are the experts in railroad operations and in the public interest, and I accept their expertise and I accept their recommendations and I intend to follow them. That means that there are many lines in which parties today expressed an interest or many segments of the lines which are subject to an abandonment order. But, the lines are still there, the ties are there, the tracks are there, the right-of-way is there, if anyone wants to buy them and start them up again and pay a reasonable price for them, they will be amazed by the cooperation they will get from the Trustee and from the Court.

It would be my intention to include in any order a provision that there be no scrapping of any segment [68] of the Railroad for the same term that the exemption for the specified segments of the line runs, it has been suggested that it be 180 days, in any area where there is an expression of interest on the part of any bona fide purchaser or any genuine hope or expectation on the part of the Trustee for a sale to a potential operator. So, in other words, it makes common sense that we don't scrap what we hope we can ultimately sell for something higher than scrap value.

So, the motion to confirm the discontinuance of the Rock Island Railroad operations will be granted. The abandonment of the operations is ordered, and by that I mean a total system abandonment. I agree with the exemption of those segments designated by the I.C.C. from this order for 180 days, as long as the operations that we are discussing are carried on by other carriers under lease or under a directed service order, so that the financial burden of these operations, if there is one, is not one of the Estate.

I refuse to impose any labor protection conditions under Section 17 of the Milwaukee Restructuring Act, and the RLEA motion for a stay of this order pending appeal is denied.

There remains only concern for the form of the order, and particularly for Paragraph 4, which [69] relies on the Brooks-Scanlon case and some constitutional consequences of that case. I think what I have said is that I'm willing to sign the order in all of its essential provisions and the quarrel, I think, relates only to that paragraph.

We can operate two ways, and I would appreciate your suggestions on it. I can sign an order today, or one that we can re-draft, which contains the essential elements of what I have said and what you have asked for, that is, confirmation of discontinuance, no labor protection, Schedule D exemptions for 180 days, and if that will solve the problem and that order can be signed today without the offending paragraph, I'll be glad to do it. If those who drafted the order think the paragraph containing the constitutional issue relying on the Brooks-Scanlon case is essential to the order I have to sign, I'd be glad to give anyone who objects to that aspect of it some time to advise me on the subject and we'll work it out.

MR. MANOS: Your Honor, I understand as to Paragraph 4, and the portion of Paragraph 4 that perhaps offends Mr. Broadley and Mr. Rush both, that there can be excised

that portion of the paragraph commencing with the second line, and I'm quoting, "And has existed since September 26th, 1979, the date the I.C.C. first declared Rock Island [70] cashless as a consequence of its operations being conducted at substantial operational losses."

If that portion is excised from the order, I believe that there is no further objection.

THE COURT: Mr. Broadley, Mr. Rush, were you able to hear that?

MR. RUSH: Yes, sir.

THE COURT: Does that satisfy you?

MR. BROADLEY: Your Honor, I think that satifies [sic] my concerns, yes.

MR. MURRAY: Your Honor, we would suggest that that would be without prejudice to the position of any of the parties on that question.

THE COURT: What it says is that I am not making a determination in this order of that issue.

MR. MORITZ: That's correct.

THE COURT: We'll remove that section from the order and as to the balance of it, I'm ready to sign it.

Yes, counsel.

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[71] THE COURT: Mr. Rush, you're standing up on that.

MR. RUSH: Yes, I welcome that too, sir, because I think the views of the Commission on labor protection, for example, are indicated in the report, which are that the legislation to be enacted would moot the issue of whether you should impose a great deal, New York dock [*sic*] under 17(a), or nothing, under prior Commission decisions. I understood you to be reserving the issue.

[72] THE COURT: I said that, I said that I was making a Section 17 determination, but I was making no comment on the recently signed bill. But, I think you misunderstood my question, Mr. Rush, because I was directing myself to whether the two-year directed service extension for the Commuter Service should be referred to in this order.

MR. RUSH: Well, what I understood your suggestion to be was that the Act be referred to so that various issues, including, I would suggest, this one and the affect on directed service, and there may be some others floating around, that would be withheld for subsequent determination. So, rather than referring——

THE COURT: I wouldn't want to specify what I'm withholding. I would merely say the Court takes cognizance of the fact, whatever the statutory reference is, is in force and effects the continued operations of the Commuter Line under directed service and whatever else you think I should specify. I merely want to advert to the Act so that the order makes clear that I was aware of it when I signed it. I don't want to interpret it or make determinations concerning it, I just want it to be there.

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[77] MR. CLARKE: Your Honor, there's one point I'd like to clarify. Your Honor said that the motion by RLEA for a stay is denied. I assume, if I understand correctly, that the motion your Honor was talking about was the motion I filed today dealing with the stay of any further liquidation.

THE COURT: Yes, that's the motion I was referring to.

MR. CLARKE: Your Honor, I'd like to direct your attention to Section 1170 (d)(1), which we submit is applicable to this case through 17(a) of the Milwaukee Restructuring Act. 1170(d)(1) of the Bankruptcy Act says, "Enforcement of an order authorizing such abandonment [78] shall be stayed until the time for taking an appeal has expired, or

if an appeal is timely taken, until such order has become final."

THE COURT: What is pending on appeal now?

MR. CLARKE: Your Honor, right now the only appeal pending is the appeal by RLEA, at least the appeal of any matters dealing here.

THE COURT: Of what?

MR. CLARKE: Of the liquidation and the refusal to transmit the order of January 25.

THE COURT: This is really a confirmation of the liquidation in a sense, the order of abandonment.

MR. CLARKE: Yes, your Honor, but I might add, your Honor, that RLEA will be filing a notice of appeal from your Honor's order today.

THE COURT: I understand that, and I think that notice of appeal and your first move in the Court of Appeals is to indicate that I've denied the stay and ask them for one, because your motion for a stay today is denied.

MR. CLARKE: Yes, your Honor, but we have not made a motion for a stay of your Honor's order authorizing abandonment, and we would submit that 1170(d)(1)——

THE COURT: Is applicable through 17, which I've said does not apply to total abandonment in this case.

Why don't you make a motion for a stay right [79] now, and I'll deny it, and then you'll have your record.

MR. CLARKE: I'll save the paperwork. We ask at this time that your Honor stay the order of today.

THE COURT: Thank you, counsel. The motion is denied.

MR. CLARKE: Thank you, your Honor.

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APPENDIX B-3

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. AB-46 (Sub-No. 22)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR (WILLIAM M. GIBBONS, TRUSTEE)—ABANDONMENT—ENTIRE SYSTEM

Decided May 23, 1980

Recommendation made to the Reorganization Court that the trustee of the Chicago, Rock Island and Pacific Railroad Company be permitted to abandon all lines and discontinue all operations. We further recommend that the court withhold abandonment and discontinuance authority for the lines involved in Finance Docket No. 28799 (Sub-No. 1), *St. Louis Southwestern Railway Company—Purchase (Portion)—William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor Between Santa Rosa, NM and St. Louis, MO,* until the Commission issues a final decision. We also recommend that the Reorganization Court require the trustee, at a reasonable price to offer the lines in appendix D for acquisition for continued rail service. Other conditions are also recommended.

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DECISION

BY THE COMMISSION:

The Chicago, Rock Island and Pacific Railroad Company, debtor (William M. Gibbons, trustee) (Rock Island) filed an application [1] on April 24, 1980 to abandon all lines and discontinue all operations over its entire 10,468-mile system. Rock Island is a common carrier by railroad subject to subchapter I of chapter 105 of title 49, United States Code.

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[1] No fee accompanied this application. Normally we require a $700 fee with an abandonment application. See 49 CFR 1002.2(d)(17). Because of the financial condition of the Rock Island, as documented in this report, we will waive payment of the fee.

An expedited proceeding has been conducted under the ICC's regulations entitled *Abandonment of Railroad Lines and Discontinuance of Service*, 49 CFR 1121 (1979), subpart F, *Abandonment Procedures for Bankrupt Railroads*, 360 I.C.C. 615 (1980), 44 F.R. 73105 (December 17, 1979) (abandonment procedures). Under these procedures, as modified, comments on the proposed abandonment were required to be filed in the form of sworn statements by May 5, 1980. We have also accepted, and considered any late-filed comments.

Section 17(a) of the Milwaukee Railroad Restructuring Act, Public Law 96-101, 93 Stat. 736 (1979) (MRRA), has transferred ultimate jurisdiction over Rock Island abandonments from the Commission to the United States District Court for the Northern District of Illinois, Eastern Division (Bankruptcy Court), the Honorable Frank J. McGarr presiding—the same court that has jurisdiction over the Rock Island reorganization/liquidation, pursuant to section 1170 of the Bankruptcy Code, 11 U.S.C. 1170. The Bankruptcy Court entered Order No. 232 (contained in appendix H) on April 14, 1980 directing the Commission to present its report in this proceeding no later than 30 days after the Rock Island filed its abandonment and discontinuance application, which is May 24, 1980. The instant report contains our recommendations on the abandonment and discontinuance request.

Conclusions

We conclude that abandonment of the Rock Island and its dissolution as an operating railroad is [*sic*] required by the public convenience and necessity. We have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued public service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and un-

certain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated. Nevertheless, the communities and shippers served by the Rock Island have also shown that many of its services are essential and can be profitable. We recommend to the court that, in permitting abandonment, it take steps to insure that the service over the viable portions of the Rock Island is not interrupted and that these portions are sold as operating lines. This will not only avoid interruption in service, but insure that the affected roadbeds and facilities are not allowed to deteriorate further through disuse or neglect. In many cases applications for the purchase of these segments or negotiations aimed at purchase are already underway, and the lines are being operated by other carriers. We would also include any other segments that attract bona fide offers. We think this resolution—total abandonment with minimum service interruption—is fair to all concerns.

Parties

Comments on the Rock Island abandonment application were filed by the Department of Defense (DOD), Department of Transportation (DOT), Iowa Department of Transportation, Transportation Regulation Board (IA-DOT), State of Kansas, Minnesota Department of Transportation (MN-DOT), Oklahoma Department of Transportation (OK-DOT), Railroad Commission of Texas (RR-TX), Panhandle Regional Planning Commission (Panhandle), city of Manhattan, KS, city of Worthington and Worthington Industries, Inc. (Worthington), Continental Illinois National Bank and Trust Company (Continental), The First National Bank of Chicago (First National), Henry Crown, et al. (Crown), SRI Inc. (SRI), Altoona-Pella Shippers Association (APSA), Keokuk Northern Real Estate Company (Keokuk), Rolscreen Company

(Rolscreen), Sun Oil Company of Pennsylvania (Sun Oil), Williamette Industries, Inc. (Williamette), Chicago and North Western Transportation Company (C&NW), Missouri-Kansas-Texas Railroad Company (Katy), Norfolk and Western Railway Company (N&W), and the Railroad [*sic*] Labor Executives' Association (RLEA).

Motion to Reject

The RLEA joined by Williamette Industries, Inc., filed a motion to reject Rock Island's application on May 5, 1980, alleging that: (1) the application does not comply with the abandonment procedures; and as a result of this (2) there is insufficient information for the Commission to evaluate the application.

Technically RLEA is correct that Rock Island's application does not comply completely with the abandonment procedures. However, in light of the court's order requiring Rock Island to file an application on 10 days' notice, and considering Rock Island's poor financial condition, we will not require technical compliance with our abandonment procedures in this instance. While the application itself may not contain sufficient information we have obtained information needed to prepare a reasoned report by taking official notice of numerous publicly available documents dealing with the Rock Island. We do not believe that RLEA has shown the likelihood of any real prejudice arising from the use of the Commission's publicly available information on the financial and operational state of the Rock Island. We will therefore deny RLEA's motion to reject because of this proceeding's unique circumstances.

History of the Rock Island

The Rock Island and its predecessor companies have basically existed as granger railroads since 1847; however, the purposes of this report are best served by focusing on Rock Island's recent history.

On March 17, 1975, Rock Island sought protection and began bankruptcy proceedings under section 77 of the Federal Bankruptcy Act. We found Rock Island cashless on September 26, 1979 and ordered the Kansas City Terminal Railway Company (KCT) to provide directed service, at government expense, over the Rock Island routes. See *Kansas City Term. Ry. Co.—Operate—Chicago, R. I. & P.*, 360 I.C.C. 289 (1979). This ended on March 23, 1980. Currently, directed service over portions of Rock Island is being carried on by a number of carriers on an uncompensated basis.[2] However, on May 31, 1980, this too will end.

The Rock Island filed a plan of reorganization on December 28, 1979, which was rejected by the Bankruptcy Court on January 25, 1980. It was stated that continuation of the Rock Island on an income producing basis, whether in core, in whole, or in part is just not possible. Judge McGarr then entered Order No. 229 requiring the filing of a plan by Rock Island to liquidate assets by July 17, 1980.

Description of the Rock Island

Rock Island operated in the 13 States of Arkansas, Colorado, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, and Texas. Its main routes are between Chicago and Tucumcari, NW, via Kansas City; St. Louis and Tucumcari via Kansas City; Memphis and Tucumcari via Little Rock, Oklahoma City, and Amarillo; Chicago and Denver via

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[2] See Directed Service Order No. 1437, *Regional Transp. Authority—Directed Service—Chicago*, 360 I.C.C. 777 (1980), 45 F.R. 21641; Directed Service Order No. 1453, *St. Louis Southwestern Railway Company—Directed Service—Chicago, Rock Island & Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) between Santa Rosa, NM and St. Louis, MO* (not printed), decided March 21, 1980, 45 F.R. 21643; Directed Service Order No. 1456, *St. Louis S. W. Ry. Co.—Directed Service—Chicago*, 363 I.C.C. 1 (1980), 45 F.R. 21639; and Directed Service Order No. 1462, *Chicago, R.I. & P.R. Co.—Directed Service*, 363 I.C.C. 72 (1980), 45 F.R. 22945.

Council Bluffs and Omaha; St. Louis and Denver via Kansas City; the Twin Cities and Galveston via Des Moines, Kansas City, Fort Worth, Dallas, and Houston; and Chicago and both Minneapolis and Galveston.

The 10,468-mile system consists of 8,139 miles of main track and 2,329 miles of branch line. Included in the Rock Island system are 763.20 miles of trackage rights over numerous carriers (detailed in appendix E). The following table indicates the Federal Railroad Administration (FRA) track class (49 CFR 213.9) of main lines as of May 1979.

TABLE 1

FRA class	Maximum speed (miles per hour)	Number of miles	Percent of total
IV	50	208.1	3.3
III	40	2,090.7	33.3
II	25	1,857.8	29.4
I	10	2,169.4	34.3
Total	.....	6,326.0	100.0

FRA inspected the portions of the Rock Island operated under directed service as of February 15, 1980, and found the following FRA track classes on main lines.

TABLE 2

FRA class	Maximum speed (miles per hour)	Number of miles	Percent of total
III and IV	40 or 50	1,829.5	33.7
II	25	1,863.2	34.3
I	10	1,322.8	24.3
Less than I	Less than 10	420.8	7.7
Total	.....	5,436.3	100.0

Rock Island has also requested authority to abandon its subsidiary railroad companies that are an integral part of its system. They are the Galveston Terminal Ry. Co. (Galveston Terminal) (equal ownership with Burlington Northern, Inc.); the Oklahoma City Junction Railway Company (Oklahoma City Junction) (equal ownership with the Atchison, Topeka and Santa Fe Railway Company); the Peoria & Bureau Valley Railroad Company (96.7 percent ownership); the Peoria Terminal Company (100 percent); and Pullman Railroad Company (100 percent).

The Rock Island principally provides freight service, operating only one commuter passenger service line. As of July 25, 1979, it operated a total of 142 trains over the system, mostly daily trains. It had 383 road diesel locomotive units in service on July 26, 1978, and 347 on July 25, 1979. The number of freight cars owned and leased totaled 25,139.

The only passenger line operated by the Rock Island is the Chicago-Joliet, IL, commuter line. Approximately 40,000 daily riders rely on the commuter service. It is estimated that cessation of this service would result in the consumption of 4.5 to 5 million additional gallons of gasoline per year by substituted automobile traffic. We found an urgent need for continued service on this line and on March 20, 1980, permitted the Illinois Regional Transportation Authority (RTA) to provide service as a "directed rail carrier," without Federal subsidization under Directed Service Order No. 1437, *supra*.

Revenues and Expenses

The Rock Island's financial condition is bleak. While the carrier's total railway operating revenues have increased yearly since 1968 (with the exception of 1975), expenses have increased more rapidly and the operating ratio has ranged from a low of 79.6 in 1971 to a high of 85.1 percent in 1977. (The figures for 1978 are not comparable because

of accounting changes.) In addition, the increasing revenues reflect price increases and mask a steady decline in traffic. See appendix C.

Net railway operating income was negative for the years 1968 through 1978. These losses have increased from $6.5 million in 1968 to $38.5 million in 1977. In addition, for the period 1968 through 1977, Rock Island has had negative working capital in all years except 1975 and 1976. See appendix B. The positive working capital for those 2 years is attributed to increases in temporary cash investments, decline in accounts and wages payable, and accrued tax liability. When Rock Island filed for protection under section 77 of the Federal Bankruptcy Act it was allowed to defer interest and principal payments on its debt, thereby bolstering its cash position.

The Rock Island's rate of return has been negative in all the years under study, and the substantial net losses every year have resulted in a decrease in the amount of stockholders' equity.

Long-term debt due within 1 year has remained somewhat constant, decreasing only slightly with the exception of 1978. The increase in 1978 is attributed to an accounting change. The carrier's long-term debt due after 1 year increased drastically in 1978, but this again is due to an accounting change.

The stockholders' equity has been shrinking since 1968, and this, combined with the carrier's increasing level of debt, has resulted in a rapidly increasing debt-equity ratio. During the period 1968 to 1974 the percentage remained fairly constant (between 30.8 percent and 34.2 percent). However, the ratio rose to 38 percent in 1975, 43.7 percent in 1976, and 51.7 percent in 1977. Without positive earnings in the future, this trend will continue. The Rock Island has been consistently unable to meet its fixed charges payments because no income was available.

Maintenance Costs

In July 1979, FRA conducted an inspection of approximately 52 percent of the main track of the Rock Island. The purpose of this 3,992-mile inspection was to determine the general condition of the track structure and assess Rock Island's ability to maintain its facility in compliance with Federal regulations. The mileage inspected was not limited to a single area, and track in each Rock Island division was included in this survey.

Many serious problems were revealed. Of the miles inspected, 1,934 or 48.4 percent did not comply with the requirements for the posted speed. Of greater concern to FRA was the fact that 24 percent (957 miles) did not comply with the standards for class I. A copy of this FRA Track Assessment Report is attached as appendix I.

The condition of Rock Island's ties was the area of greatest concern in the FRA inspection report. Estimates reveal that it will require over 428,000 ties to bring the surveyed track into compliance with class I. To bring the track into compliance with the timetable speeds, it is estimated that 2,395,000 ties are needed. Rock Island also has serious rail problems with an estimated 44,000 rails (of 39-foot-long rail) needed to bring the track into compliance with FRA requirements.

Rock Island has reported: deferred maintenance—road on the line $213.7 million, deferred maintenance—equipment $20.8 million, delayed capital improvements—roads $82.7 million, and delayed capital improvements—equipment $77.9 million.

In summary, Rock Island has an immediate need for substantial rehabilitation throughout its system, but it cannot meet this need because of its steadily declining revenue base and severe financial problems.

Effect on Shippers and Communities

In October and November 1979, we held 24 days of public hearings in 17 cities throughout the Midwest to determine the need for continued directed service over the Rock Island. The Rail Services Planning Office (RSPO) prepared a report from the hearing transcripts and written statements which were submitted at these hearings. RSPO concluded that the public consistently deemed Rock Island's services essential for the following reasons:

(1) Captive shippers;

(2) higher transportation costs by truck;

(3) infeasible truck transportation because of rail dependent commodities, inaccessibility to highways, weight limitations, and poor road conditions;

(4) shutdowns or relocations of businesses would result from a cessation of service;

(5) full grain elevators; and

(6) a need to preserve competition.

At a number of the hearings, witnesses emphasized that the Rock Island was critical to the movement of the Nation's grain since in 1978 it moved 10 percent of the Nation's western grain.

During the strike by Rock Island employees, (August-October 1979), shippers had to try to find alternate transportation. Impacts on shippers from the strike included: no service and consequent shutdowns; employee layoffs; depletion of existing inventories; increased grain storage; discounted prices on products sold; and higher transportation charges (if alternate transportation was available). These same impacts will result if the entire Rock Island system is abandoned without some provision for continued service.

We recognize the adverse effects which abandonment would have on shippers, communities, and the local public. In making our recommendations, we must consider the burden which future operations would have on the Rock Island. We must also keep in mind that it is highly unlikely Rock Island will be able to start up operations which have been discontinued since August 1979.

Effect on Employees

Abandonment of the Rock Island would also harm local economies due to the multiplier effect of losing the railroad employees' salaries. The number of employees was 8,675 prior to the strike, while KCT employed 8,270 during directed service. The number of Rock Island employees now working is unknown, while those that will be working after abandonment and acquisition cannot even be estimated. See appendix G.

National Defense

DOD concerned itself with the impact of a cessation of Rock Island service on defense installations at the Twin Cities Army Ammunition Plant, MN; Fort Sill, OK; Houston Port, TX; McAlester Army Ammunition Plant, OK; McConnel Air Force Base, KS; and Rock Island Arsenal, IL. Rail service to these facilities is considered necessary for their efficient operation in peacetime, and *essential* during mobilization periods. All installations but Rock Island Arsenal have alternate rail transportation. Service to the Rock Island Arsenal will be discussed later.

Abandonment Criteria

The application to abandon its entire line and trackage rights, and to discontinue operations, submitted to this Commission by the Rock Island is governed by the criteria of 49 U.S.C. 10903. Section 17(a) of the MRRA transferred

jurisdiction over Rock Island abandonments from this Commission to the Bankruptcy Court which has jurisdiction over the proposed termination of all railroad operations by Rock Island.

We are submitted [*sic*] our recommendation to the court pursuant to section 17(b)(2) of the MRRA and 11 U.S.C. 1170. Our role under 11 U.S.C. 1170 is that of an advisor since the Bankruptcy Court has the final authority over the abandonment of lines of bankrupt railroads pursuant to the Bankruptcy Code.

Section 19 of the MRRA removes from consideration in bankrupt railroad abandonment proceedings the National Environmental Policy Act.

Our duty under 49 U.S.C. 10903 is to determine whether the public convenience and necessity warrant abandonment. In making this determination, we must weigh the hardships the abandonment will impose upon the shippers and communities involved, against the present and future burden which would be imposed on the railroad and interstate commerce by continued operations. *Colorado* v. *United States,* 271 U.S. 153 (1926).

Discussion

General.—The abandonment of an entire rail system the size of the Rock Island requires a weighing of national defense, energy conservation, and rural and community development as well as economic consequences such as lack of rail service, unemployment, and higher shipping charges in light of the burden of continued Rock Island operations on interstate commerce and the rights of Rock Island's creditors. By adopting our recommendations, the Bankruptcy Court can achieve an equitable balance of these factors.

Our weighing of the evidence in this proceeding convinces us that highly persuasive arguments in favor of Rock

Island's abandonment come from its physical (a deteriorated plant requiring hundreds of millions of dollars to upgrade) and fiscal condition (staggering losses for over a decade). Counterarguments of need for continued service and employee impact over the entire system that have been made are not as persuasive. With regard to the entire system, Rock Island's creditors (Continental, First National, Crown, and SRI) support abandonment, while RLEA opposes the abandonment on the grounds that cashlessness is a transitory phenomenon.

Rock Island's cashlessness of September 1979 was the result of an arduous and painful erosion of its traffic base and facilities. Its current financial condition suffers from the same malaise, with a huge retained earnings deficit. In our judgment, this situation will not change and, as a corporate entity and as a railroad the Rock Island has failed. We would not require this entity to continue to provide services, or even exist. However, we would make provision for the continuation of essential services.

* * * *

Employee protection.—RLEA urges that we recommend employee protection at a level greater than required by *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). *New York Dock* protection is apparently mandated by section 17(a) of the MRRA. However, under that section the duty to impose employee protection squarely rests with the Bankruptcy Court. We will make no recommendation, but will point out certain options that the court has.

The *New York Dock* conditions can be imposed on the Rock Island. However, another viable option is not to impose any form of labor protection. In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted. See, *Wellsville, Addison & Galeton R. Corp.—Abandonments*, 354 I.C.C. 744, 746

(1978). Finally, the entire issue of imposing employee protective conditions may be rendered moot shortly by congressional action.

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Other.—There are three other matters that this report will cover before making our final recommendations.

Rock Island has requested permission to abandon five subsidiaries, two of which are jointly owned with other railroads. Rock Island's subsidiaries which are wholly owned should be abandoned. However, where the subsidiary is jointly owned, as are Galveston Terminal and Oklahoma City Junction, neither we nor the Bankruptcy Court can permit their abandonment, since the subsidiary railroads are not considered bankrupt.

Our jurisdiction over abandonment of these railroads can only be effectuated by the filing of an application under 49 U.S.C. 10903. The Bankruptcy Court, on the other hand, has no jurisdiction over the Galveston Terminal or Oklahoma City Junction, since neither is bankrupt or [*sic*] a wholly owned subsidiary of Rock Island. The proper course involving these two railroads is for Rock Island to sell its ownership interest.

It is also appropriate here to advise persons interested in acquiring and operating Rock Island lines of the procedures they must follow. There are two types of lines involved which require different procedures to be followed, those abandoned and those not abandoned.

A line that has been abandoned is no longer a line of railroad as that term is used in section 17(b)(1) of the MRRA. Therefore, acquisition of that type of line requires an agreement with the trustee, and approval of the agreement by the Bankruptcy Court. If the buyer wants to operate as a railroad over the acquired line, it must then come to the Commission for a certificate of public convenience and necessity to operate the line. This is governed

by 49 U.S.C. 10901. The regulations regarding the application are found at 49 CFR 1120. While an application is pending temporary service may occur under an emergency service order from our Railroad Service Board. The Commission's staff is available to anyone with questions or needing advice in this area.

For Rock Island lines that are not abandoned, their sale is subject to the requirements of section 17(b) of the MRRA. The procedure to be followed requires an agreement with the trustee, approved by the Bankruptcy Court. An application must be filed with us complying with 49 CFR 1111, subpart B, *Acquisition Procedures for Lines of Railroads in Reorganization,* 45 F.R. 6107 (1980). Upon the filing of this application the Bankruptcy Court may permit the buyer to operate interim service over the line to be purchased. See, section 17(b)(3) of the MRRA. Again the Commission staff is available to provide assistance.

Were this a normal abandonment proceeding, we would find that because of its poor financial condition, deteriorated physical plant, and eroded traffic base that the present and future public convenience and necessity permit the abandonment of Rock Island's entire system as an entity upon the conditions that it: (1) keep in place and attempt to sell, upon reasonable terms, all lines in appendix D for continued rail service; (2) keep in place all other lines for which offers have been received prior to the hearing before the Bankruptcy Court; and (3) not abandon any lines for which purchase applications are pending. We base our recommendations on this.

COMMISSIONER STAFFORD, concurring in part, dissenting in part:

I agree with the majority's conclusions with one exception, that is the failure to include the Denver-Omaha/Kansas City main line in appendix D (see p. 172).

If the court agrees that this line is not worthy of being "kept intact" the practical result means the end of rail service to one of this country's greatest grain producing areas. The economic and social consequences to the communities located on the line were well documented at the public hearing we held at Phillipsburg, KS, last October. They range from increased costs of at least 25 cents per bushel to the farmer to millions of dollars needed to upgrade highways in order to accommodate the increased truck traffic. In short, there is a serious question as to whether the grain can in fact be moved by truck.

Recommendations

We recommend the following to the Bankruptcy Court:

1. The trustee should be authorized to abandon the entire Rock Island system consisting of 10,468 miles including 8,139 miles of main track, 2,329 miles of branch lines, and to discontinue service over 763.20 miles of trackage rights conditioned upon:

(a) keeping in place and attempting to sell, for a reasonable period of time, upon reasonable terms, all portions of the Rock Island in appendix D for continued rail service; and

(b) not permitting abandonment of any line for which a purchase application is pending with the Commission.

2. If, by the scheduled date of commencement of court hearings in this proceeding, a financially responsible person comes before the court and offers to acquire any other of Rock Island's lines sought to be abandoned, the court should postpone authorizing the abandonment of these lines for which offers had been made for a reasonable time to permit negotiations.

3. The court should require the trustee to keep intact the tracks and rail facilities of those lines which are listed in

appendix D or are subject to applications or offers to purchase for a reasonable period of time. The trustee should be authorized to dispose of those lines which are not subject to offers to purchase.

4. The court should permit prospective purchasers to provide interim service over the line until sales are consummated.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Commissioner Stafford concurring in part, dissenting in part with a separate expression. Commissioner Alexis absent and not participating.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

• • • •

Appendix D

The abandonment should be conditioned upon the Rock Island offering the following portions of its system for sale, upon reasonable terms, for continued rail service.

Lines	*Mileage*
Minneapolis-St. Paul, MN to Kansas City, MO	492
Iowa Falls gateway in Iowa	[1]200
Iowa Falls to Estherville	
Rake to Ocheyedan and Sibley	
Palmer to Royal	
Dows to Forest City	
Altoona to Pella, IA	[1]25
Carlisle to Indianola, IA	[1]5
Newton to Earlham, IA	64

[1] Approximate mileages.

Chicago to Peoria, and Pekin, IL (including the Pullman Branch)	161
West Davenport to Fruitland, IA	[1]30
Seymour to Centerville, IA	15
Quad City Area, Rock Island, Moline [*sic*] Davenport and East Moline (including service to the Rock Island Arsenal)	
Fairbury, to Hallam, NE	36.5
Santa Rosa, NM to St. Louis, MO	965.2
Colby to Caruso, KS	48
Phillipsburg to CBQ Junction, KS	[1]15
Memphis, TN to Fordyce, AR (via Little Rock) including the branch line between Haskell, Malvern and Hot Spring [sic], AR	226
McAlester to El Reno, OK	192
Topeka, KS to St. Joseph, MO	[1]121
Eldorado to Catesville, AR	8
Herington, KS to Fort Worth and Dallas, TX	474

Points

Cedar Rapids, IA
Waterloo, IA
Keokuk, IA
Washington, IA
Burlington, IA
Fairfield, IA
Beatrice, NE
Denver, CO
Colorado Springs, CO
Dodge City, KS
Amarillo, TX
Alexandria, LA
Camden, AR

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[1] Approximate mileages.

APPENDIX B-4

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-46 (Sub-No. 22)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR (WILLIAM M. GIBBONS, TRUSTEE)— ABANDONMENT—ENTIRE SYSTEM

Decided December 2, 1980

Only July 11, 1980, the Railway Labor Executives' Association (RLEA) filed a petition seeking reopening, reconsideration and modification of that portion of our May 23, 1980 Report (Report) to the Bankruptcy Court (Court) dealing with labor protective conditions. The Chicago, Rock Island and Pacific Railroad Company, Debtor (William M. Gibbons, Trustee) (Rock Island) and a group of creditors replied on August 25, 1980.

Our Report, issued under section 17(a) of the Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979) (MRRA), advised the Court, among other things, that abandonment of the Rock Island and its dissolution as an operating railroad was required by the public convenience and necessity. It also advised the Court concerning labor protection under the MRRA.

After the Commission filed its Report, Congress enacted the Rock Island Railroad Transition and Employee Assistance Act (RITEA), Pub. L. No. 96-254 (1980) and more recently the Staggers Rail Act of 1980, Pub. L. No. 96-448 (1980) (1980 Act). Section 106 of RITEA as amended by section 701 of the 1980 Act provides Rock Island employees the labor protection sanctioned by Congress. Although the constitutionality of these laws is currently under review,

they effectively pre-empt labor protection to Rock Island employees resulting from the abandonment, and therefore, the Commission's further consideration of its recommendations to the Court in this regard are moot.

In view of the above, RLEA's petition must be dismissed because it addresses issues that have been mooted by Congressional intervention.

It is ordered:

1. The petition of the Railway Labor Executives Association filed July 19, 1980 is dismissed for the reasons stated above.

2. This decision is effective on the date served.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam.

Agatha L. Mergenovich
Secretary

(SEAL)

JUDGMENT,
ORDER ON REHEARING
AND
OTHER APPENDIX MATERIALS

APPENDIX C

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
October 13, 1981

Before
Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. EAST, Senior District Judge*

Nos. 80-1788, 80-2199 and 80-2286

IN THE MATTER OF:
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

APPEALS OF:
RAILWAY LABOR EXECUTIVE [*sic*] ASSOCIATION (RLEA),
Intervenor.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-B-2697 Frank J. McGarr, Judge.

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED as to the systemwide abandonment order of

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* The Honorable William J. East, Senior District Judge of the District of Oregon, is sitting by designation.

June 2, 1980; RLEA's appeals from the orders approving the sales to Mo-Pac and SSW are DISMISSED as moot; in accordance with the order of this Court entered this date. Costs on appeal are to be charged against intervenor.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
December 10, 1981

Before
Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. EAST, Senior District Judge*

Nos. 80-1788, 80-2199 and 80-2286

IN THE MATTER OF:
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

APPEALS OF:
RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervenor-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-B-2697 Frank J. McGarr, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Intervenor-Appellant, Railway Labor Executives' Association, no judge in active service[1] has requested a

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* The Honorable William J. East, Senior District Judge of the District of Oregon, is sitting by designation.

[1] The Honorable Wilbur F. Pell, Jr. disqualified himself and did not participate in any consideration of the above-entitled Petition for Rehearing and Suggestion of Rehearing *En Banc*.

vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

STATUTES INVOLVED

1. Section 17, Milwaukee Railroad Restructuring Act, 45 U.S.C. § 915

Sec. 17(a). Notwithstanding any other provision of law, in any case pending under section 77 of the Bankruptcy Act on the date of enactment of this Act, the court may authorize the abandonment of lines of railroad pursuant to section 1170 of title 11 of the United States Code. Pending the expiration of the time for appeal of an abandonment order or the determination of any such appeal, the court may authorize the termination of service on a line to be abandoned, and the order authorizing such termination may not be stayed. In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code.

(b)(1) Notwithstanding any other provision of law, in any case pending under section 77 of the Bankruptcy Act on the date of enactment of this Act, the court may authorize the sale or transfer of a line of railroad to be used in continued rail operations, subject to the approval of the Commission under paragraph (2) of this subsection, if the application with respect to such sale or transfer is filed with the Commission on or after November 1, 1979. In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49, United States Code.

(2) The court described in paragraph (1) may not authorize a sale or transfer pursuant to such paragraph unless an appropriate application with respect to such sale or transfer is initiated with the Commission and, within such time as the court may fix, not exceeding 180 days, the

Commission, with or without a hearing, as the Commission may determine, and with or without modification or condition, approves such application, or does not act on such application. Any action or order of the Commission approving, modifying, conditioning, or disapproving such application is subject to review by the court only under sections 706(2)(A), 706(2)(B), 706(2)(C), and 706(2)(D) of title 5 of the United States Code.

(3) Pending review of an application by the Commission pursuant to paragraph (2) of this subsection, the court described in paragraph (1) may, on a preliminary basis, authorize the sale or transfer proposed in such application. The court may permit the purchasing carrier to operate interim service over the lines to be purchased, and in operating such service it shall use employees of the carrier subject to the bankruptcy proceeding to the extent such purchasing carrier deems necessary for the operation of such service.

(c) Any action of order of the Commission approving, modifying, conditioning, or disapproving an application for the sale or transfer of rail property that is filed with the Commission before November 1, 1979, in connection with a case pending under section 77 of the Bankruptcy Act on the date of enactment of this Act—

(1) is subject to review by the court only under sections 706(2)(A), 706(2)(B), 706(2)(C), and 706(2)(D) of title 5 of the United States Code; and

(2) may not be stayed by the Commission.

(d) The authority of the bankruptcy court to authorize abandonments, sales, and transfers of lines of the Milwaukee Railroad shall be governed by the provisions of section 5 of this Act, rather than the provisions of this section.

(e) Nothing in this section shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this Act.

2. Section 1170, Bankruptcy Code, 11 U.S.C. § 1170, as amended*

Sec. 1170(a) The court, after notice and a hearing, may authorize the abandonment of a railroad line if such abandonment is—

(1)(A) in the best interest of the estate; or
(B) essential to the formulation of a plan; and
(2) consistent with the public interest.

(b) If, except for the pendency of the case under this chapter, such abandonment would require approval by the Commission under a law of the United States, the trustee shall initiate an appropriate application for such abandonment with the Commission. The court may fix a time within which the Commission shall report to the court on such application.

(c) After the court receives the report of the Commission, or the expiration of the time fixed under subsection (b) of this section, whichever occurs first, the court may authorize such abandonment after notice to the Commission, the Secretary of Transportation, the trustee, any party in interest that has requested notice, any affected shipper or community, and any other entity prescribed by the court, and a hearing.

(d)(1) Enforcement of an order authorizing such abandonment shall be stayed until the time for taking an appeal has expired, or, if an appeal is timely taken, until such order has become final.

(2) If an order authorizing the abandonment of a railroad line is appealed, the court, on request of a party in interest, may authorize termination of service on a line or a portion of a line pending the determination of such appeal, after notice to the Commission, the Secretary of

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* 11 U.S.C. § 1170 was amended by Section 227 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1931, which added subsection (e).

Transportation, the trustee, any party in interest that has requested notice, any affected shipper or community, and any other entity prescribed by the court, and a hearing. An appellant may not obtain a stay of the enforcement of an order authorizing such termination by the giving of a supersedeas bond or otherwise, during the pendency of such appeal.

(e)(1) In authorizing any abandonment of a railroad line under this section, the court shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347 of title 49.

(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.

APPENDIX F

List of RLEA Member Organizations

American Railway & Airway Supervisors Association, Division of BRAC
American Train Dispatchers Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Brotherhood Railway Carmen of the United States and Canada
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organization of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union

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CLERK

No. 81-1805

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND RESPONDENTS IN OPPOSITION

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April 29, 1982

ISSUE PRESENTED

Did the reorganization court abuse its discretion in refusing to impose labor protection conditions in the total line abandonment of the Rock Island Railroad when it based its decision on the consistent decisions of this Court, the lower federal courts and the Interstate Commerce Commission, the recommendations of the Commission and independent experts, and five years of hearings regarding the factual circumstances of this case?

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No. 81-1805

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND RESPONDENTS IN OPPOSITION

The Rock Island respondents[1] respectfully request that this Court deny the petition for a writ of certiorari filed by Petitioner Railway Labor Executives' Association ("RLEA") in the above proceeding.

OPINIONS BELOW AND JURISDICTION

The Rock Island respondents adopt that portion of the petition entitled "Opinions Below" and "Jurisdiction."

[1]The Rock Island respondents are: William M. Gibbons, Trustee of the Chicago, Rock Island & Pacific Railroad Company (the "Rock Island"); Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island; The First National Bank of Chicago, as indenture trustee for the first mortgage bondholders; and Continental Illinois National Bank and Trust Company of Chicago, as indenture trustee for the income debenture holders. Parent companies, subsidiaries and affiliates of the Rock Island respondents are listed in Appendix A, hereto.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Rock Island respondents adopt that portion of the petition entitled "Constitutional Provisions and Statutes Involved," but add that this case involves the uniform interpretation accorded to Section 10903 of the Interstate Commerce Act, 49 U.S.C. § 10903, and Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, reproduced in pertinent part *infra*, p. 3, n.3.

STATEMENT OF THE CASE

The facts pertinent to these proceedings are set forth in the petition at pages 1-15 and in the opinion of the court of appeals (Pet. App. 1a-3a).[2]

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT BELOW WAS CONSISTENT WITH DECISIONS OF THIS COURT, AND WITH THE UNIFORM DECISIONS OF OTHER COURTS AND THE INTERSTATE COMMERCE COMMISSION.

The determination of the reorganization court and the court of appeals that the Rock Island had no labor protection obligation is consistent with the relevant legislative history, an unbroken line of Interstate Commerce Commission determinations, and this Court's decision in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), and its progeny.

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[2]The respondents take exception to the statement of petitioner that the Trustee "locked-out" his contract employees. (Pet. 5.) This is not supported by the record below. For a more complete narrative of these reorganization proceedings, the Rock Island respondents respectfully refer the Court to its narrative of these reorganization proceedings in *RLEA* v. *Gibbons* ___ U.S. ___, 102 S.Ct. 1169, 1171-74 (1982) and the statement of facts at pp. 5-15 of the Brief for the Rock Island Appellees, filed therein on September 26, 1981 (hereinafter "Appellees' Brief").

In 1979, Congress enacted the current procedure for abandonments of railroads in reorganization under Section 77 of the Bankruptcy Act of 1938, as amended. Section 17(a) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. § 915(a), transferred the jurisdiction to authorize abandonments of rail lines from the Commission to the reorganization court. It also transferred to the reorganization court jurisdiction to consider labor protection issues which arise in connection with abandonments. Congress specifically directed the reorganization court to follow the law of labor protection that had evolved under the Commission's decisions, so that this transfer of jurisdiction from the Commission to the reorganization court would make "no change in existing law as it affects employee protection." H.R. CONF. REP. NO. 96-583, 96th Cong., 1st Sess. 27, *reprinted in* 1979 U.S. CODE. CONG. & AD. NEWS 1747, 1759.[3]

Prior to the enactment of Section 17(a), Commission approval of abandonments of railroad lines was governed by 49 U.S.C. § 10903. Like Section 17(a), Section 10903 incorporated and followed the Commission's decisions on labor protection that were

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[3]Section 17(a) provides:

> "[I]n authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 [of the United States Code]."

45 U.S.C. § 915(a).

Section 11347 is the recodification of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), which applies only to labor protection to be accorded in consolidation, mergers and acquisitions.

Section 11347 provides that the I.C.C. shall require a carrier

> "to provide a fair arrangement at least as protective of the interests of employees who are affected by [consolidation, merger or acquisition] as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45."

49 U.S.C. § 11347.

issued pursuant to Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347. Under Section 10903, when a railroad abandoned only part of its operation, employee protection conditions were imposed. *See Oregon Short Line Railroad—Abandonment—Goshen*, 360 I.C.C. 666, 667 (1980). When entire lines were abandoned, however, the Commission consistently refused to impose labor protection conditions. As the Commission pointed out in this case in its advisory report of May 23, 1980 to the reorganization court, "[i]n past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted." *Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150, 161 (1980). *Accord, Montpelier & Barre Railroad—Abandonment*, Dkt. No. AB-202F (I.C.C. Feb. 6, 1980); *Northampton & Bath Railroad—Abandonment*, 354 I.C.C. 784, 785-86 (1978); *Wellsville, Addison & Galeton Railroad—Abandonment*, 354 I.C.C. 744, 746 (1978); *Tennessee Central Railway—Abandonment*, 333 I.C.C. 443, 453-54 (1968); *East Carolina Railway—Abandonment*, 324 I.C.C. 506 (1964); *Okmulgee Northern Railway—Abandonment*, 320 I.C.C. 637, 645-46 (1964); *Rutland Railway—Abandonment*, 317 I.C.C. 393, 408 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers v. United States*, 217 F. Supp. 98 (N.D. Ohio 1963). *See also In re New York, Susquehanna & Western Railroad*, 504 F. Supp. 851, 854-56 (D. N.J. 1980), *aff'd*, Nos. 81-1121 and 81-1929 (3d Cir. Nov. 16, 1981), *petition for cert. filed*, 50 U.S.L.W. 3784 (U.S. Mar. 16, 1982) (No. 81-1715).[4]

For example in *Wellsville, Addison & Galeton Railroad—Abandonment, supra*, 354 I.C.C. at 746, the Commission stated:

> Prior Commission precedent in this area is well established. Employee protective conditions have not been im-

[4]For a full discussion see Appellees' Brief at 28-44.

> posed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations. *Okmulgee Northern Ry. Co.—Abandonment*, 320 I.C.C. 637 (1964). *Tennessee Central Ry. Co.—Abandonment*, 333 I.C.C. 443, 454 (1968).

Petitioner presents no law to the contrary. Rather, petitioner contends that these decisions are "erroneously decided" and inapposite. (Pet. 23.) However, Congress specifically recognized, when it re-enacted Section 10903, that system-wide abandonments are subject to this discrete and consistent rule. The legislative history of Section 10903 makes the point plainly, referring to

> [e]mployee protection no less beneficial than that established under Section 5(2)(f) of the Interstate Commerce Act and Section 405 of the Rail Passenger Service Act but *without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company*. . . .

S. CONF. REP. NO. 94-595, 94th Cong., 2d Sess. 218, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 148, 233 (emphasis supplied).[1]

The Commission's consistent refusal to impose labor protection in total line abandonments—in the context of a railroad entitled to liquidate—is consistent with and compelled by the uniformly recognized right of investors to withdraw their property from public transportation service under the circumstances described in the *Brooks-Scanlon* line of cases. See Appellees' Brief at 25-27. As this Court recognized in *Brooks-Scanlon*, "If the plaintiff

---

[1] This legislative history related to Section 1a(4), which has been recodified as Section 10903. Thus, petitioner's contention that pre-1976 cases are irrelevant (Pet. 23) is erroneous. Similarly, there is no authority for petitioner's purported distinction between "major carriers" and others. (Pet. 23.)

be taken to have granted the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." 251 U.S. 399. *Accord, Railroad Commission* v. *Eastern Texas Railroad,* 264 U.S. 79, 85 (1924); *Bullock* v. *Railroad Commission,* 254 U.S. 513, 520-21 (1921). Thus it is a "basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be a fundament of the taking provision." *In re Central Railroad,* 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied,* 414 U.S. 1131 (1974) (footnotes omitted). *See also Regional Rail Reorganization Act Cases,* 419 U.S. 102, 122-24 (1974).

The petitioner argues for a *per se* rule—labor protection conditions *must* be imposed in all abandonments. (Pet. App. 9a.) This contention is unfounded. Even assuming, *arguendo,* that the imposition of labor protection is not prohibited in all total abandonments, at a minimum the reorganization court retains discretion not to impose it. The Commission recognized this in rejecting labor protection conditions in *Northampton & Bath Railroad—Abandonment, supra,* 354 I.C.C. at 785-86:

> Congress did not intend to curtail the Commission's discretion regarding protective conditions in entire line abandonments.
>
> After the entire line of a railroad is abandoned, no operating carrier remains to . . . pay the costs of employee protection . . . [E]mployee protective conditions . . . would, in effect, require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease.

There can be no challenge to the reorganization court's exercise of discretion in the circumstances of this case. The Rock Island's right to withdraw completely from rail service is compelling. After a decade of losses totaling $103.4 million, the railroad entered reorganization in 1975. At the Court's direction, rail operations were continued for four and one-half years at a staggering

loss of $210,627,230. By the summer of 1979, the Rock Island was rendered cashless as a result of continued losses, the strike by certain unions represented herein by the RLEA, and the failure of those unions to order their members to comply with the Presidential Order to return to work. The Commission, the Federal Railroad Administration, the Department of Transportation, the reorganization court and the United States Court of Appeals all thereafter agreed that the Rock Island could not be reorganized on an income basis as an ongoing railroad. (Pet. App. 2a-6a.)

The *Oregon Short Line* labor protection conditions, which petitioner seeks, would require payment to each employee of a dismissal allowance, effectively equivalent to his annual wage for six years. 360 I.C.C. at 98-103. Based on the payroll at the time Rock Island's operations ceased in the fall of 1979, the cost of labor protection could exceed $500 million.[6] Petitioner does not suggest how this sum of money will materialize.[7]

It is for these reasons that the Commission and courts have uniformly refused to impose labor protection conditions on total line abandonments. Petitioner cannot separate this well-established rule from its jurisprudential roots in constitutional values, legislative history and common sense. Petitioner provides no basis in the circumstances of this case for a radical departure from that rule.

Accordingly, the reorganization court and the court of appeals were correct in refusing to condition the Rock Island's abandonment upon the imposition of labor protection conditions.

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[6] *See In re Chicago, M., St. P. & P. R.R.*, 658 F.2d 1149, 1156 (7th Cir. 1981), *petition for cert. denied sub nom. RLEA* v. *Ogilvie*, 50 U.S.L.W. 3716 (U.S. Mar. 8, 1982) (No. 81-1250) where the cost of labor protection under this same formula is estimated as between $300 million and $1.2 billion.

[7] The Commission concluded under similar circumstances in *Tennessee C. Ry., supra*, that it is "neither equitable nor warranted on any ground . . . to require further consumption of the railroad properties for the payment of employees after the railroad ceases operations." 333 I.C.C. at 454.

II. THIS CASE DOES NOT MERIT REVIEW BY THIS COURT BECAUSE THIS CASE HAS ONLY LIMITED PRECEDENTIAL VALUE, PRESENTS NO CONSTITUTIONAL ISSUE, AND CONCERNS ONLY A NARROW ISSUE OF STATUTORY CONSTRUCTION.

This case presents no constitutional question. Rather it presents only a narrow issue of statutory construction about which there is no conflict among the lower courts. The court of appeals applied a uniformly recognized statutory principle against the background of the special circumstances of these reorganization proceedings: the five years of futile and costly efforts to save the Rock Island as an operating railroad; the Interstate Commerce Commission's finding that the Rock Island was cashless; the reorganization court's finding, based upon the testimony of its own expert witness, that the Rock Island could not be reorganized as an operating railroad on an income basis; the Commission's report recommending total abandonment; and the reorganization court's liquidation order. (Pet. App. 4a.)[7] The petitioner's arguments concerning the impact of this case not only ignore the fact that the courts below applied the same uniform interpretation of the relevant law that has been applied in all other similar cases but also ignore the power of Congress to enact new legislation if it disagrees with the uniform interpretation given its enactments by the courts. The petitioner argues that in light of the decision of the district court below and the *Susquehanna* decisions, Congress "cannot be assured" that any new enactments will

[7]This particularized focus explains the Seventh Circuit's decision to publish its opinion in this case under its own Circuit Rule 35, thus precluding reliance on this case as precedent for any other case within the circuit. Circuit Rule 35(b)(2)(iv) provides:

> Except to support a claim of *res judicata*, collateral estoppel or law of the case, [unpublished orders] shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

be upheld by the courts. (Pet. 20-21.) It argues that "under the guise of either statutory construction or the protection of general, undefined constitutional rights," the lower courts have imposed "unwarranted obstacles" on the ability of Congress to legislate. (Pet. 16.) However, the decision of the court of appeals *sub judice* rested solely on statutory grounds, and petitioner is not entitled to an advisory opinion on the constitutional parameters of permissible legislation to guide Congress in the unlikely event it enacts new legislation.

The court of appeals properly interpreted the relevant statute so as to avoid the complicated constitutional challenge that petitioner's interpretation would raise. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). For the same reasons, this Court should not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander* v. *Tennessee Valley Authority*, *supra*, 297 U.S. at 346, *quoting Liverpool, New York and Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

III. THE COURT OF APPEALS DID NOT MISCONSTRUE 11 U.S.C. § 1170 TO PERMIT AN ABANDONMENT WITHOUT AN EVIDENTIARY HEARING.

Petitioner contends that the court of appeals erred in affirming the reorganization court's abandonment order because the reorganization court did not hold an evidentiary hearing. (Pet. 25-29.) The court of appeals determined, however, that the reorganization court provided an adequate evidentiary hearing. (Pet. App. 4a-5a.)

Judge McGarr stated this point (Pet. App. 27a):

> I've been holding hearings on the subject of abandonment of the Rock Island for five years. Five years of arguments,

> reports, surveys, audits, plans, Commerce Commission recommendations. . . . I have determined, based on all of these hearings, that there's nothing left which can be reorganized. . . .

Additionally, as the court of appeals noted, petitioner sought an evidentiary hearing essentially to attack collaterally the reorganization court's January 25, 1980 liquidation decision, "a question that had been previously decided." (Pet. App. 5a.) In short, the issue *sub judice* has been considered by the Interstate Commerce Commission, the Federal Railroad Administration, the Department of Transportation, independent experts, the reorganization court, and the court of appeals. All have unanimously agreed upon the challenged result. Any additional expenditure of judicial resources would not be well spent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 29, 1982

APPENDIX A

Parent Companies, Subsidiaries and Affiliates

Parent companies, subsidiaries and affiliates of the Rock Island respondents are as follows:

A. William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company

Affiliates

A&M Ry. Bridge & Terminal Co.
The Belt Ry. Co. of Chicago
Calumet Western Ry. Co.
Denver Union Terminal Ry. Co.
Galveston Terminal Ry. Co.
Great Southwest R.R., Inc.
Houston Belt & Terminal Ry. Co.
Illinois Terminal R.R. Co.
Iowa Transfer Ry. Co.
Joliet Union Depot Co.
Keokuk Union Depot Co.
The Minnesota Transfer Ry. Co.
Oklahoma City Jct. Ry. Co.
Peoria & Bureau Valley R.R. Co.
Peoria Ry. Terminal Co.
Pullman Railroad Company
Rock Island Improvement Co.
St. Paul Union Depot Co.
Trailer Train Company
Warren & Ouachita Valley Ry. Co.
Wichita Union Terminal Ry. Co.

B. The First National Bank of Chicago

Parent

First Chicago Corporation

Principal Subsidiaries

Network EFT, Inc.
International Commercial Bank Limited
N.W. Slavenburg's Bank

Principal Affiliates

First Chicago Cheque Corporation
First Chicago Trust Company of Arizona
First Chicago Realty Services Corporation
First Capital Corporation of Chicago
First Chicago Fiduciary and Investment Services Corporation
First Chicago Overseas Finance N.V.
First Chicago Financial Corporation
First Chicago Credit Corporation
Real Estate Research Corporation
First Chicago Lease Holdings, Inc.
UBAF Arab American Bank

C. Continental Illinois National Bank and Trust Company of Chicago

Parent

Continental Illinois Corporation

Subsidiaries

Continental International Finance Corporation
Continental Bank International (Texas)
Continental Bank International (Pacific)
Continental Bank International
Conill Bank A.G.
Continental Bank S.A./N.V.
Continental Illinois Bank (Switzerland)

Continental Development Bank, S.A.L.
Underwriters Bank (Overseas) Limited
Continental Illinois Thailand Ltd.

Affiliates

Continental Illinois Leasing Corporation
Continental Illinois Equity Corporation
Continental Illinois Venture Corporation
Republic Realty Mortgage Corporation
Continental Illinois (Canada) Ltd.
Continental Illinois Investment Advisory
Continental Illinois Limited
Continental Illinois International Investment

D. Henry Crown, et al., include the Arie and Ida Crown Memorial, an Illinois not-for-profit corporation, which has no parent, subsidiaries or affiliates.

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No. 81-1805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee of The Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, *et al.*; UNITED STATES OF AMERICA; and THE INTERSTATE COMMERCE COMMISSION,
Respondents.

REPLY BRIEF OF PETITIONER

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No. 81-1805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee of The Chicago,
Rock Island & Pacific Railroad Company; *et al.*,
Respondents.

REPLY BRIEF OF PETITIONER

Respondents Trustee, indenture trustees, and the Henry Crown interests filed a joint brief in opposition to the petition by the Railway Labor Executives' Association [hereinafter, "RLEA"] for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and to reverse the Judgment of that Court entered on October 13, 1981, in *In re Chicago, Rock Island & Pacific Railroad*, 7th Cir. Nos. 80-1788, *et al.* Petitioner RLEA believes a brief reply should be made to several arguments raised by respondents, and therefore this Reply Brief is respectfully submitted pursuant to Rule 22.5 of the Rules of this Court.

ARGUMENTS

1. The Rock Island Respondents Fail To Acknowledge That The Courts Below Decided The Employee Protection Issue In A Manner Contrary To Both The Will Of Congress And Prior Decisions Of This Court

Respondents confidently assert that the decisions by the lower courts on the employee protection issue are consistent with prior decisions of this Court and with the intent of Congress in enacting the mandatory employee protection requirements of Section 17(a) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. § 915(a). But in making such assertions, respondents fail to address the fact that they have used their view of legislative intent to support a result which is *contrary* to the plain meaning of the clear and unambiguous language which Congress used to command that: "In authorizing *any abandonment* pursuant to this section, *the court shall require* the carrier to provide a fair arrangement" to protect employees. 45 U.S.C. § 915(a) (emphasis added). This Court has consistently found that such a result (*i.e.*, one contrary to the plain language of a statute) is at odds with the rules of statutory construction. *E.g.*, *Crooks* v. *Harrelson*, 282 U.S. 55, 59-60 (1930); *see also*, *Railway Labor Executives' Assoc.* v. *Scott*, Sup. Ct. No. 81-1715, Reply Br. for Petitioner at 2-3. Moreover, respondents are incorrect in believing that the result reached by the lower courts in this case is in furtherance of the will of Congress in enacting the employee protection requirements of Section 17(a) of the MRRA.

To support their contention that Section 17(a) of the MRRA must be viewed as giving the Rock Island reorganization court the discretion to ignore mandatory language used by Congress, respondents refer to that Act's Conference Report and assert "Congress specifically directed the reorganization court to follow the law of labor protection that had evolved under the Commission's decisions, so that this transfer of jurisdiction [over abandonments] from the Commission to the reorganiza-

tion court would make 'no change in existing law as it affects employee protection.' " Resps.' Br. at 3, *quoting*, H. Rpt. No. 96-583, 96th Cong., 1st Sess. at 27 (1979). Congress, however, gave no such direction.

The only instruction given in Section 17(a) with respect to employee protection was that: "In authorizing any abandonment pursuant" to that section, the court was to provide a fair arrangement of at least a minimum level of protection for employees. In its Conference Report, Congress made the statement that the employee protection requirements it enacted were intended "to make no change in existing law as it affects employee protection" (H. Rpt. No. 96-583, *supra*, at 27), but such a statement, petitioner respectfully submits, cannot be construed as a license to permit the lower courts to disregard the plain meaning of Section 17(a); the plain meaning of that Section is simply a statement of what Congress considered that existing law to be. *Accord, United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980).

Respondents and the lower court's efforts to expand an ambiguous statement in the MRRA Conference Report into a "clear direction" to construe mandatory language as being permissive in an entire line abandonment situation, besides being contrary to this Court's directions on statutory construction, are erroneous for other reasons as well. First, a review of the congressional debates which led to passage of the MRRA will show, petitioner submits, that Congress never considered Section 17(a) as having an exception to its plain meaning for entire line abandonments. Petitioner's research has failed to locate even one reference in either the debates or conference report which specifically refers to such an exception. Respondents and the courts below have been able to locate only the ambiguous reference referred to above to support, in their opinion, their view of the legislative intent. Petitioner RLEA respectfully submits that such silence is telling evidence that

Congress did not intend to achieve a result contrary to the plain meaning of the language it employed. *Accord, United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). Indeed, it was this very silence which led the General Counsel of the Interstate Commerce Commission [hereinafter "ICC" or "Commission"] in February 1980 to inform Congress that he had concluded that Section 17(a) of the MRRA "obligated" the Rock Island reorganization court to impose employee protective provisions when, and if, it authorized the abandonment of the Rock Island. Letter of ICC General Counsel to Sen. Nancy L. Kassebaum, H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 63 (1980) (reproduced herein as Appendix G at 63a).[1]

Respondents seek to justify this silence by contending that prior to the passage of the MRRA, the ICC "consistently refused to impose labor protection conditions" when authorizing entire line abandonments. Resps.' Br. at 4. However, respondents and the lower courts failed to take into account both the impact which the 1976 amendment had upon that practice, and the limits upon that policy which the ICC had previously stated existed. *See*, Petition at 23-24.

Prior to 1976, the ICC had made it clear that its decision whether or not to impose employee protective provisions in an entire line abandonment was an exercise of discretion which it enjoyed under the Interstate Commerce Act. For example, in

---

[1] Respondents allege that "the cost of labor protection could exceed $500 million." Resps.' Br. at 7 (footnote omitted). That estimate, however, is not based upon any facts developed in the record of this case; respondents should not be permitted to make such an unsupported allegation, especially since they successfully objected to a hearing at which such facts could have been developed. Moreover, that allegation fails to recognize that the actual cost of employee protection would probably be well below that figure since the potential costs of such protection compels the estate, in an effort to minimize its exposure to unemployment costs, to require potential purchasers of Rock Island lines to hire Rock Island employees. Without such potential costs, there is no incentive to exact hiring commitments as a condition of the sale.

Okmulgee Northern Ry.—Abandonment, 320 I.C.C. 637, 645-46 (1964), a small railroad entire line abandonment case, the ICC stated that it could impose employee protective conditions in an appropriate case, but declined to do so in that case because there were no "special circumstances" dictating a departure from its usual practice. Three (3) Commissioners dissented in that case. In *Seaboard Air Line R.—Trackage Rights*, 312 I.C.C. 797, 800 (1962), an entire line abandonment case in which it imposed employee protective conditions, the Commission stated as follows:

> Although we have not generally imposed such conditions in cases involving abandonment of an entire line of railroad, there is no statutory prohibition on our doing so and, where circumstances make such action reasonable and in the public interest, it is our duty to afford protection to employees who may be adversely affected by such an abandonment.

In *Penn Central Transportation Co.—Reorganization*, 347 I.C.C. 45, 92 (1973), the Commission indicated that the unemployment of a large number of employees was a special circumstance which would justify the imposition of employee protection in entire line abandonment cases.

Congress, of course, has the ultimate authority to declare what form of commerce regulation is appropriate in the public's interest (*e.g.*, *Ecker* v. *Western Pac. R.*, 318 U.S. 448, 468 (1943)), and in 1976 Congress instructed the ICC to impose a fair arrangement, of at least a certain level, to protect employees affected by abandonments. Section 802, Pub. L. No. 94-210, 90 Stat. 31, 127 (1976) (since recodified as 49 U.S.C. § 10903, *et seq.*) The plain language of that statute deprived the ICC of discretion to decline to impose protective conditions, and, petitioner submits, instructed the ICC that henceforth the public interest required the imposition of employee protections in "each" abandonment. 49 U.S.C. § 10903(b)(2). That command, petitioner submits, was part of the "existing law" to

which Congress referred when it enacted Section 17(a) of the MRRA.

A second defect with respondents' assertions is that they and the lower courts totally ignored the clear and unequivocal indications by Congress that it was Congress' will that Rock Island employees be protected when, and if, the debtor was authorized to be abandoned. Before the reorganization court authorized the abandonment of the Rock Island in June 1980, Congress expressed its belief that Section 17(a) of the MRRA had required employee protection in the Rock Island liquidation. H. Rpt. No. 96-839, *supra*, at 21-22. Moreover, in enacting, and then reenacting the employee protection provisions of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1005, 1008 (*but see, Railway Labor Executives' Assoc., Inc.*, v. *Gibbons*, Sup. Ct. Nos. 80-415 and 80-1239, decided March 2, 1982), Congress has twice emphasized that it considered protection of Rock Island employees to be essential to its effective regulation of rail commerce. Surely, the failure of respondents and of the lower courts to examine such strong indicia of Congressional intent in this case (*e.g.*, *United States* v. *American Trucking Assoc.*, 310 U.S. 534, 543 (1940)) is reason enough for this Court to exercise its supervisory powers to review the lower courts' decisions on such a crucial area in the relationship between the power of Congress to enact regulations of commerce and the duty of the courts to enforce those regulations as written.

II. Contrary To Respondents' Assertions, This Case Does Present Important Issues Concerning The Power Of Congress To Regulate Commerce

According to respondents, this Court should not exercise its discretionary powers to review the lower courts' decisions at bar because, they assert, this case is of only limited precedential value and presents no constitutional issue. In advancing such assertions, however, respondents totally ignore the impact

which this case has had upon Congress' efforts to regulate commerce in the Rock Island service area in a manner which Congress deemed appropriate. *See*, 45 U.S.C. § 1001; Pet. at 25. Moreover, respondents' effort to belittle the importance of this case by asserting that petitioner is seeking an advisory opinion on constitutional issues is contrary to the facts of this case and to respondents' arguments both to the lower courts and to this Court.

Respondents' attempts to denigrate the constitutional issue presented by this case are without merit. First, as respondents argued to the court of appeals and to this Court in both their Rock Island Act brief (*Id.* at 33) and their brief in opposition to this petition (Resps.' Br. at 5), it is their contention that the *Brooks-Scanlon*[2] principle prohibits as a matter of constitutional law the imposition under Section 17(a) of the MRRA of a requirement to protect employees. That issue, as the letter from the ICC General Counsel to Senator Kassebaum shows (Appendix H at 63a), is an important and unsettled question as to Congress' power to require a liquidating railroad to aid its employees survive the demise of their employer. While it is correct that this Court need not reach that issue in this case if it concludes that the lower courts' construction of Section 17(a) was correct, the fact that the need to address this issue is contingent does not render this question non-justiciable. *Compare, Regional Rail Reorganization Act Cases*, 419 U.S. 102, 145-46 (1974), *with, Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584 (1947). More importantly, in light of the reorganization court's express reliance upon *Brooks-Scanlon* to justify its refusal to impose employee protective provisions in this case (Pet. at 20a), this case is an excellent vehicle to resolve the constitutional issue presented herein.

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[2] *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U.S. 396 (1920).

Respondents' efforts to belittle the precedential value of this case are also without merit, for those reasons set forth in the petition (Pet. at 19-20), and for the following reason.

As the Rock Island Transition and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.*, clearly shows, Congress is of the belief that protection of Rock Island employees is essential to its regulation of commerce in the Rock Island service area. Respondents have previously argued that the failure of Congress to require such protection in Section 17(a) of the MRRA effectively precluded Congress from requiring in the Rock Island Act that the debtor aid its employees. Appellees' Br. in *Railway Labor Executives' Assoc.* v. *Gibbons*, Sup. Ct. Nos. 80-415 and 80-1239 at 28-34, 55-60. Certainly they will raise such constitutionally based arguments if Congress, in light of this Court's rejection of Sections 106 and 110 of the Rock Island Act, again requires by legislation that the estate protect employees affected by the Rock Island's demise.[3] Consequently, it is beyond dispute that the case at bar is of great importance to Congress' ability to regulate commerce effectively.[4]

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[3] Such an argument is not speculative for Congress is presently considering reenacting the employee protective features of the Rock Island Act on a generic basis which applies to the Rock Island reorganization proceeding. H.R. 6308, 97th Cong., 2nd Sess.

[4] Respondents' argument that this case lacks real precedential value because it is unpublished ignores reality. *See, Wise* v. *Murphy*, 275A.2d 205, 214-15 (D.C. App. 1971).

CONCLUSION

For the reasons stated herein and previously stated, petitioner RLEA respectfully requests that a Writ of Certiorari be issued to review and to reverse the Judgment of the Seventh Circuit.

Respectfully submitted.

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Attorney for Railway Labor Executives' Association

Dated: May 18, 1982

APPENDIX G

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., February 26, 1980.

Re: Liability of Rock Island Estate for Employee Protection
Hon. NANCY L. KASSEBAUM,
U.S. Senate, Washington, D.C.

DEAR SENATOR KASSEBAUM: This responds to your request at the hearing on February 20, 1980 for amplification of my opinion that the Estate of the Rock Island Railroad is liable for employee protection in connection with liquidation proceedings.

My opinion is based primarily on two decisions of the courts in deciding upon the value to be placed on assets of bankrupt railroads required to be transferred. In the first such decision a three-judge district court, in affirming the Commission's valuation of the rail properties of the bankrupt New Haven Railroad required by the Commission to be included in the merged Penn Central, held:

> When the case was last before us, we indicated tentative agreement with that position. We cited authorities which established in our view that a railroad with no reasonable hope of future earnings, such as NH, had a constitutional right * * * to cease operations and liquidate," [*sic*] 289 F.Supp. 440, since to force operation at a loss "would be to take its property without the just compensation which is a part of due process of law." *Railroad Commission of State of Texas* v. *Eastern Texas R.R.*, 264 U.S. 79, 85 44, S. Ct. 247, 249, 68 L.Ed. 569 (1924); *Bullock* v. *State of Florida ex rel. Railroad Commission*, 254 U.S. 513, 41 S. Ct. 193, 65 L.Ed. 380 (1921); *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, 40 S. Ct. 183, 64 L.Ed. 323 (1920). Despite observations in the Commission's report, 334 I.C.C. at 55-57, we adhere to that view, for reasons fully developed in the recent opinion of the reorganization court, subject only to the qualification that liquidation of NH could not commence until the Commission, acting with appropriate speed under § 1(18) of the Interstate Commerce Act, had issued the certificate of abandonment to which NH would have been constitutionally entitled. We believe this position is also supported by two opinions of Mr. Justice Brandeis which we read as declaring that while Congress may in the public interest subject a

> secured creditor to reasonable delays in realizing on his security, it may not deprive him altogether of his right to sell the rest at public auction. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 55 St. [*sic*] Ct. 854, 79 L.Ed. 1593 (1935); *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 57 S. Ct. 556, 81 L.Ed. 736 (1937).

New York, N.H. & H.R.R. Co., First Mortgage 4% Bond Holders' Committee v. *United States*, 305 F.Supp. 1049, 1055 (S.D.N.Y. 1969). This holding was at least tacitly approved by the Supreme Court's observation in the *New Haven Inclusion Cases*, 399 U.S. 392 at 461, that "no one here quarrels with the proposition that in the event of a liquidation, New Haven would have been obliged to obtain a certificate from the Commission pursuant to § 1(18) of the Interstate Commerce Act."

The second decision is the decision of the Special Court under the Regional Rail Reorganization Act concerning the values to be assigned properties transferred to Con Rail under the Act. *In the Matter of Valuation Proceedings Under §§ 303(e) and 306 of the Regional Rail Reorganization Act*, 439 F.Supp. 1351 (1977). In addressing the question of whether erosion for operations continued by the various estates during the period prior to conveyance of property to Con Rail should be compensable, the court stated (439 F.Supp. at 1370-71):

> A third proposition is that § 1(18) does not cease to be applicable merely because serious erosion of the property of railroad is taking place. As indicated, the railroads in Brooks-Scanion, Bullock, and Eastern Texas had been through all administrative processes that were required. Despite the desperate situation of the New Haven which had experienced net operating losses for four and a half years before invoking § 77, see *New York, New Haven, and Hartford Railroad Discontinuance of Trains*, 327 I.C.C. 151, 166 (1966), and by 1963 had no prospect for a successful reorganization on the basis of capitalized earnings, see *In re New York, New Haven and Hartford Railroad*, 289 F.Supp. 451, 456 (D.Conn. 1968), Judge Anderson considered that authorization to abandon would have had to be obtained from the Interstate Commerce Commission, *In re New York, New Haven and Hartford Railroad*, 304 F.Supp. at 801; as shown above, the Supreme Court rejected the

> Commission's proposal to take account of an additional year to obtain such authority not because it thought that this was not needed, but because Judge Anderson had already taken into account a reasonable period for obtaining it. 399 U.S. at 463, 90 S. Ct. 2054. Again, as noted in Section III of this opinion, our own decision on the 180-day Appeals held that the Brooks-Scanlon principle had been qualified by requiring compliance with reasonable requirements for administrative approval; perhaps it would have been more accurate to say that the Brooks-Scanlon doctrine needed no such qualification since the administrative process had been exhausted in that case and its two early companions. See also *New York, New Haven and Hartford Railroad First Mortgage 4% Bondholders' Committee* v. *United States*, 305 F.Supp. at 1055; *In re Central Railroad of New Jersey*, 485 F.2d at 215. The validity of this third proposition is in no way impaired by decision, stemming from the *Third Avenue Transit* case, supra, 198 F.2d 703, that a reorganization court cannot properly impair liens by such measures as approving the issuance of trustees' or receivers' certificates or authorizing use of the proceeds of sale of mortgaged properties for operations when the prospect of successful reorganization has disappeared, but instead must direct a trustee to apply for abandonment.

See also *id.* at 1366-67 wherein the Court analyzes the import of the *New Haven* decision cited above.

The above decisions appear to indicate that a certificate of abandonment must be obtained before liquidation can commence. The question then becomes whether the Commission or the court overseeing the reorganization of the Rock Island should, or must, impose labor protective conditions upon its grant of the certificate.[1] Although the matter is not entirely free from doubt, I am inclined to the view that the reorganization court is obligated to impose employee protective conditions upon its grant of a certificate authorizing abandonment. Of course, the priority which the court affords claims for payments under these conditions will to a large extent determine the value of the conditions to the affected employees.

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[1] Section 17(a) of the recently enacted Milwaukee Railroad Restructuring Act (P.L. 96-101) (MRRA) transfers ultimate responsibility for authorizing abandonments from the Commission to the courts overseeing the reorganization of railroads in reorganization at the date of its enactment other than the Milwaukee.

Prior to enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), it was settled law that the Commission had broad discretion to determine whether and to what extent labor protective conditions should be included in certificates authorizing abandonment. The Commission customarily, but not always, imposed the so-called Burlington employee protective conditions, which afforded substantially less protection to affected employees than those imposed upon certificates authorizing mergers under former Section 5(2). The *Tennessee Central* case,[2] referred to at the hearing, was one of a number of cases in which the Commission refused to impose employee protection upon abandonment of an entire railroad system. The explanation given by the Commission for refusing to impose employee protective conditions in all of these cases was that it would be inequitable and unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations (333 I.C.C. at 454).

With the enactment of the abandonment provisions of the 4R Act, Commission discretion with respect to the imposition of labor protection on certificates authorizing abandonment was apparently eliminated. Section 1a(4) of the Interstate Commerce Act, as added by the 4R Act, provides:[3]

> Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

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[2] [*sic*] *Tennessee Central Ry. Co., Abandonment*, 333 I.C.C. 443, 454 (1968), 334 I.C.C. 235, 244-46 (1969).

[3] As recodified at 49 U.S.C. 10903(b)(2), that provision now reads:

> Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

In considering the effect of that provision in an entire system abandonment proceeding following enactment of the 4R Act,[4] the Commission acknowledged that "The precise language of Section 1a(4) of the Act would appear to require imposition of employee protective conditions in all permitted abandonments" (354 I.C.C. at 745) at the same time relying on the statement in the legislative history (H.R. Rep. No. 94-781, 94th Cong., 2d Sess., p. 218) that what ultimately became Section 1a(4) was not intended to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad. The Commission concluded that it had discretion not to impose employee protection and, adhering to its prior line of decisions on the subject, it declined to do so. This decision was subsequently followed by a decision of the Commission in a proceeding entitled *Northampton & Bath R.R. Co. — Abandonment*, 354 I.C.C. 784 (1978). Neither of these decisions were appealed to the courts and the time for doing so has long since expired. Accordingly, it must be accepted that the Commission in those cases believed it had discretion not to impose labor protective conditions on entire system abandonments.

However, as indicated, supra, n. 1, Section 17(a)(1) [*sic*] transfers ultimate responsibility for authorizing abandonments by the Rock Island from the Commission to the Court overseeing its reorganization. That section expressly provides that:

> in [*sic*] authorizing any abandonment pursuant to this section the Court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 of the United States Code.

The conditions developed by the Commission under that section were upheld on review in *New York Dock Railway* v. *United States*, 609 F.2d 83 (2d Cir. 1979) as the minimum level of employee protection required by amendments to former Section 5(2) enacted as a part of

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[4] *Wellsville Addison & Galeton R.R. Corp. — Abandonment*, 345 I.C.C. 744 (1978).

the 4R Act. Thus there would appear to be no doubt as to the level of protection required to be afforded employees, if abandonment is a necessary precondition to liquidation, as I believe it is. Also, there is no legislative history associated with the MRRA comparable to that relied on by the Commission in holding it had discretion under the 4R Act not to impose employee protective conditions on entire system abandonments.

For the foregoing reasons, I am of the view that, regardless of whether the Commission has discretion to decline to impose employee protection upon entire system abandonments, the reorganization court is obligated to impose the so-called New York Dock conditions upon its approval. The value of those conditions will, however, be directly related to the priority the court assigns to employee claims thereunder.

Sincerely yours,

RICHARD A. ALLEN,
General Counsel.